SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	6
Statement	6
Summary of Argument	10
Argument	18

I.

The Standards for Judging Scienter in Obscenity Prosecutions Should Conform to the Free Speech and Press, Due Process, and Fair Trial Provisions of the First, Fifth and Sixth Amendments. Rigorous Standards Are Required to Assure the Public's Access to Constitutionally Protected Material, to Avoid Additional Ambiguity in the Definition of Obscenity, and to Guarantee That an Act With Innocent Intent Shall Not Be Deemed a Crime in Obscenity Prosecutions. Mere Proof of Knowledge of Contents Is Not Sufficient to Establish Guilty Knowledge. The Trier of the Facts Should Be Required to Find Beyond a Reasonable Doubt That the Accused Knew the Contents of the Material; Was Aware of the Obscene Character of the Contents; and With Such Knowledge and Awareness, Intentionally Disseminated the Material With the Specific Intent to Appeal to the Prurient Interest of the Recipient. An Honest Belief That the Known Contents of a Publication Are Not Obscene Should Constitute a Defense. The Rulings of

Page

the Courts Below, and the Instructions and Failures to Instruct as Requested, Deprived Petitioners of Rights Guaranteed by the Provisions of the First, Fifth, Sixth and Eighth Amendments 18

II.

The Record Is Barren of Any Evidence to Establish That Petitioners or Any of Them, Knew the Contents of the Brochure. There Is No Evidence in the Record to Establish That Petitioners Corruptly Conspired to Violate the Federal Obscenity Statute by Mailing or Causing to Be Mailed the Alleged Obscene Brochure. There Is No Evidence in the Record to Establish That Petitioners Knowingly Mailed or Caused to Be Mailed or Aided and Abetted the Mailing of the Said Brochure. 18 U.S.C. §§2, 371 and 1461, as Construed and Applied to Authorize the Judgments of Conviction Herein Violate the Free Speech and Press, Due Process, Fair Trial and Cruel and Unusual Punishment Provisions of the First, Fifth, Sixth and Eighth Amendments 51

III.

The Wholesale Exclusion of Constitutionally Relevant Evidence Proffered by Petitioners Deprived the Petitioners of a Fair Hearing and Fair Trial, an Opportunity to Be Heard and to Defend Against the Charges, With Resultant Deprivation of Petitioners' Liberty, Contrary to the Free Speech and Press, Due Process and Fair Trial Provisions of the First, Fifth and Sixth Amendments 64

Conclusion 77

TABLE OF AUTHORITIES CITED

Cases	Page
Bailey v. Alabama, 219 U.S.219	48, 53
Baumgartner v. United States, 322 U.S.665	53
Blount v. Rizzi, 400 U.S.410	24
Bollenbach v. United States, 326 U.S.607	32
Boyce Motor Lines, Inc. v. United States, 342 U.S. 337	27
Brady v. United States, 24 F.2d 399 (8 Cir. 1928)	61
Burgin v. South Carolina, 404 U.S.806, rvsg. 178 S.E.2d 325	69
Byrd v. United States, 342 F.2d 939 (D.C. Cir. 1965)	33
Chin Yow v. United States, 208 U.S.8	73
Cole v. Arkansas, 333 U.S.196	42
Cool v. United States, 409 U.S.100	59
Crawford v. United States, 212 U.S.183	74
Dahley v. United States, 50 F.2d 37 (8 Cir. 1931)	63
Davis v. United States, 62 F.2d 473 (6 Cir. 1933)	24
DeJonge v. Oregon, 299 U.S.353	42
Dennert v. United States, 147 F.2d 286 (6 Cir. 1945)	63
Dennis v. United States, 341 U.S.494	39
Doe v. Bolton, 410 U.S.179	45
Eastern & Atl. R. Co. v. Henderson, 279 U.S.639	48
Eisenstadt v. Baird, 405 U.S.438	45

Page

Estep v. United States, 140 F.2d 40 (10 Cir. 1943) 37

Fiske v. Kansas, 274 U.S.380 53

Fox v. State of Washington, 236 U.S.273 27

Fulbright v. United States, 91 F.2d 210 (8 Cir. 1937) 36

Ginsberg v. New York, 390 U.S.629 .....31, 45

Grimes v. United States, 379 F.2d 791 (5 Cir. 1967) 60

Griswold v. Connecticut, 381 U.S.479 45

Grunewald v. United States, 353 U.S.391 63

Hartstein v. Missouri, 404 U.S.988 43

Hartzel v. United States, 322 U.S.680 39

Hygrade Provisions Co. v. Sherman, 266 U.S.497.. 27

Jenkins v. McKeithen, 395 U.S.411 73

Keegan v. United States, 325 U.S.478 .....53, 62

Kois v. Wisconsin, 408 U.S.229 43

Krulewitch v. United States, 336 U.S.440 63

Langer v. United States, 76 F.2d 817 (8 Cir. 1935) 62

Leary v. United States, 395 U.S.6 48

Manley v. Georgia, 279 U.S.1 48

Manual Enterprises, Inc. v. Day, 370 U.S.478 .....25, 29, 30

Miller v. California, 413 U.S.15 .....27, 46

Miller v. United States, 120 F.2d 968 (10 Cir. 1941) 76

Mishkin v. New York, 383 U.S.502 .....30, 31

Morissette v. United States, 342 U.S.246 .....33, 47

Page

Morris v. United States, 156 F.2d 525 (9 Cir. 1946) 33

Nash v. United States, 229 U.S.373 27

New York Times Co. v. Sullivan, 376 U.S.254 .....13, 26, 39, 40, 41

Nicolopoulos v. United States, 332 F.2d 247 (1 Cir. 1964) 60, 61

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S.292 47

People v. Finkelstein, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470 (1961) 30, 31

Pettibone v. United States, 148 U.S.197 42

Pinkus v. Pitchess, 429 F.2d 416 (9 Cir. 1970), aff'd 400 U.S.922 69

Rabe v. Washington, 405 U.S.13 42

Roe v. Wade, 410 U.S.113 45

Rosen v. United States, 161 U.S.29 (1896) ....11, 14 .....22, 45, 47

Rosenberg v. United States, 120 F.2d 935 (10 Cir. 1941) 61

Roth v. United States, 354 U.S.504 .....5, 24, 25 .....26, 27, 28, 33, 45

Russell v. United States, 369 U.S.749 42

Saunders v. Shaw, 244 U.S.317 73

Screws v. United States, 325 U.S.91 .....32, 38, 39

Smith v. California, 361 U.S.147 .....25, 28, 29 .....30, 48, 62, 72

Speiser v. Randall, 357 U.S.513 .....26, 59, 61, 62, 73

Spies v. United States, 317 U.S.492 37

Page

Tot v. United States, 319 U.S.463 .....48, 53

United States v. Bishop, 412 U.S.346 37

United States v. Buckley, 49 F.Supp.993 (D.C. D.C. 1943) 58

United States v. Burleson, 255 U.S.407 .....23, 24

United States v. Carll, 105 U.S.611 42

United States v. Denman, 483 F.2d 1093 (8 Cir. 1973) 42

United States v. Docherty, 468 F.2d 989 (2 Cir. 1972) 60

United States v. Falcone, 311 U.S.205 .....37, 63

United States v. Fields, 466 F.2d 119 (2 Cir. 1972) 36

United States v. Food and Grocery Bureau of Southern California, 43 F.Supp.996 (D.C. Cal. 1942) 58

United States v. Friedman, ... F.2d .... (10 Cir. Nos. 72-1143-1144, December 11, 1973) 46

United States v. Gallishaw, 428 F.2d 760 (2 Cir. 1970) 36

United States v. Gardner, 171 F.2d 753 (7 Cir. 1948) 36

United States v. Garguilo, 310 F.2d 249 (2 Cir. 1962) 60

United States v. Harris, 347 U.S.612 27

United States v. Hayward, 420 F.2d 142 (D.C. Cir. 1969) 22

United States v. Henson, ... F.2d .... (9 Cir. No. 73-2063, October 5, 1973) 46

United States v. Hill, 464 F.2d 1287 (8 Cir. 1972) 60

Page

United States v. Interstate Engineering Corp., 288 F.Supp.402 (D.C. N.H. 1967) 57

United States v. Jensen, 462 F.2d 736 (8 Cir. 1972) 63

United States v. Jiminez-Serrato, 451 F.2d 523 (5 Cir. 1971) 36

United States v. Krosky, 418 F.2d 65 (6 Cir. 1969) 33

United States v. Lynn, 461 F.2d 759 (10 Cir. 1972) 53

United States v. Minor, 459 F.2d 103 (5 Cir. 1972) 75

United States v. Murdock, 290 U.S.389 37

United States v. Musgrave, 444 F.2d 755 (5 Cir. 1971) 32, 33

United States v. Nitti, 444 F.2d 1056 (7 Cir. 1971) 36

United States v. O'Dell, 462 F.2d 224 (6 Cir. 1972) 32

United States v. Orito, 413 U.S.139 25

United States v. Palladino, ... F.2d .... (1 Cir. No. 72-1005, January 5, 1974) 46

United States v. Peoni, 100 F.2d 401 (2 Cir. 1938) 60

United States v. Petrillo, 332 U.S.1 27

United States v. Ragen, 314 U.S.513 27

United States v. Roberts, 465 F.2d 1373 (6 Cir. 1972) 53

United States v. Rubin, 312 F.Supp.950 (D.C. Cal. 1970) 22

Page

United States v. San Francisco Electrical Contractors Ass'n, 57 F. Supp.57 (D.C. Cal. 1944) 58

United States v. Spingola, 464 F.2d 909 (7 Cir. 1972) 36

United States v. Squires, 440 F.2d 859 (2 Cir. 1971) 33

United States v. Stagman, 446 F.2d 489 (6 Cir. 1971) 48, 49

United States v. Steele, 469 F.2d 165 (10 Cir. 1972) 63

United States v. Townsend, 474 F.2d 209 (5 Cir. 1973) 60

United States v. Williams, 470 F.2d 1339 (8 Cir. 1973) 60

United States v. Wurzbach, 280 U.S.396 27

United States v. Zborowski, 271 F.2d 661 (2 Cir. 1959) 75

Vachon v. New Hampshire, ... U.S. .... (Oct. Term, 1973, No. 73-573, Jan. 14, 1974) 53

Wiener v. California, 404 U.S.988 43

Winship, In re, 397 U.S.358 58

Wolcher v. United States, 200 F.2d 493 (9 Cir. 1952) 74

Miscellaneous

Report of the Commission on Obscenity and Pornography (1970) pp. 358-362 46

Rules

Federal Rules of Criminal Procedure, Rule 30 6

Statutes Page

United States Code, Title 18, Sec. 2 .....2, 3, 4, 6, 51

United States Code, Title 18, Sec. 371 .....2, 3, 4, 6, 51, 62

United States Code, Title 18, Sec. 472 36

United States Code, Title 18, Sec. 1461 .....2, 3, 4 ....5, 6, 11, 23, 24, 26, 29, 33, 41, 51, 61, 62

United States Code, Title 18, Sec. 1952 48

United States Code, Title 18, Sec. 2312 49

United States Code, Title 18, Sec. 2421 49

United States Code, Title 28, Sec. 1254(1) 2

United States Constitution, First Amendment ....3, 4 ..5, 6, 13, 18, 24, 25, 37, 40, 45, 50, 51, 61, 64, 67

United States Constitution, Fifth Amendment ....3, 4 .....6, 18, 51, 64

United States Constitution, Sixth Amendment ....3, 4 .....5, 6, 18, 51, 64

United States Constitution, Eighth Amendment ..3, 4 .....6, 18, 41, 51

United States Constitution, Fourteenth Amendment 38, 40

Textbooks

Abelson & Crow, "The Scienter Element in California's Obscenity Laws: Is There a Way to Know?", 24 Hastings Law Journal (1973) pp. 1303-1325 .....37, 44

19 American Jurisprudence 2d, Sec. 1391, p. 786.. 57

53 American Jurisprudence, Trial, Sec. 545 33

Copes, "The Mens Rea Provisions of the Proposed Ohio Criminal Code—The Continuing Uncertainty", 33 Ohio State Law Journal (1972) pp. 354-396 37

Page

Hall, General Principles of Criminal Law, 2d Ed., 1960, pp. 254-257 60

Johnson, "The Pornography Report: Epistemology, Methodology and Ideology", 10 Duquesne Law Review (1971) pp. 190-219 46

Leventhal, "The 1973 Round of Obscenity-Pornography Decisions", 59 American Bar Association Journal (1973) pp. 1261-1266 46

Lockhart & McClure, "Censorship of Obscenity: The Developing Constitutional Standards", 45 Minnesota Law Review (1960) pp. 5, 106-108 .. 42

Model Penal Code, Tentative Draft No. 4 (1955) pp. 12-18, 123-139 37

Note, "The Scienter Requirement in Criminal Obscenity Prosecutions", 41 New York University Law Review (1966) pp. 790-791 49

Paul and Schwartz, Federal Censorship, "Obscenity in the Mail" (1961) p. 257 .....23, 24

1 Wigmore (3d Ed. 1940), Sec. 29 76

Wright, Federal Practice and Procedure: Criminal, Sec. 487 33

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS KEMP, WRIGHT AND THOMAS.

Opinion Below.

The opinion of the Court of Appeals is reported at 481 F.2d 307 and appears in Appendix A to the Petition for Writ of Certiorari, pages 1 through 38.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 7, 1973. A due and timely petition for rehearing and suggestion for rehearing *en banc* was filed on or about June 18, 1973. On August 22, 1973, an order was entered stating that the afore-

said petition "will be submitted to the full court".[1] A copy of the said order appears in Appendix B to the Petition for Writ of Certiorari, pages 39 and 40. On August 23, 1973, an order was entered denying the petition for rehearing and rejecting the suggestion for a rehearing *en banc*. A copy of the said order appears as Appendix C to the Petition for Writ of Certiorari, page 41. On August 28, 1973, the Honorable Stanley N. Barnes, a Judge of the United States Court of Appeals for the Ninth Circuit, made an order staying issuance of the mandate of the court pending the filing, consideration and disposition by this Court of a Petition for a Writ of Certiorari on or before September 24, 1973. A copy of the said order appears as Appendix D to the Petition for Writ of Certiorari, page 42. The Petition was filed on September 18, 1973, and Granted on January 14, 1974. Jurisdiction of this court rests on 28 U.S.C. 1254(1).

Questions Presented.

1. Whether provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, under a standard for judging scienter solely by alleged proof of knowledge of the "contents" of the brochure involved, the courts below having rejected any requirement of proof of knowledge of the alleged obscenity of the brochure or proof of reckless disregard of the alleged obscenity, or intent to commit a public wrong, and specifically rejecting a defense of honest ignorance of the alleged obscenity of the bro-

[1]An order was initially entered on July 9, 1973, denying the petition for rehearing, but was thereafter, by order of the court, withdrawn on July 19, 1973.

chure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute an infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

2. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without any evidence to establish that each of the petitioners even possessed knowledge of the alleged contents of the brochure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

3. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without proof of the essential elements of obscenity and scienter, or proof of corrupt agreement or aiding and abetting or causation by petitioners, under both the conspiracy and substantive counts of the indictment, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

4. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the trial court excluded an entire category of constitutionally relevant evidence offered by petitioners on the issues of nonobscenity of the brochure and lack of guilty knowledge, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

5. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the indictment was returned by a grand jury which was presented with no evidence of the essential elements of the offense charged, which was misdirected by the prosecutor as to the applicable law, and where the prosecutor appealed to the biases and prejudices of the members of the grand jury, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

6. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied to petitioners' pre-June 21, 1973 conduct, violated the guarantees of the First and Fifth Amendments

to the United States Constitution, because they failed to provide "fair notice" or "concrete guidelines" as to what sexual expression was prohibited by the provisions of the statute.

7. Whether, in light of this Court's June 21, 1973 rulings, the Indictment herein is fatally defective because it failed to inform petitioners of the nature and cause of the accusations against them in violation of the provisions of the Sixth Amendment.

8. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied to authorize the jury to measure the prurient appeal of the brochure by its impact on undefined sexually deviant groups rather than solely by its impact on the average person in the Nation as a whole, violated the free speech and press provisions of the First Amendment and the due process provisions of the Fifth Amendment.

9. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied, violate the free speech and press provisions of the First Amendment and the due process provisions of the Fifth Amendment, because the trial court instructed the jury that it could find the brochure obscene even if the brochure did not meet the *Roth-Memoirs* test if the jury found "pandering", notwithstanding the fact that neither the statute nor the Indictment fairly advised petitioners that they were charged with pandering.

10. Whether the brochure at issue is protected by the free speech and press provisions of the First Amendment.

11. Whether petitioners were denied a fair trial, and due process of law, when the trial court, in open

defiance of Rule 30, Federal Rules of Criminal Procedure, denied petitioners the opportunity to make objections to the court's jury charge outside the presence of the jury.

12. Whether petitioners were denied a fair trial by an impartial and representative jury, in violation of the guarantees of the Fifth and Sixth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Eighth Amendments; Title 18 United States Code §§2, 371 and 1461; and Rule 30 of the Federal Rules of Criminal Procedure appear in Appendix E to the Petition for Writ of Certiorari, pages 43 through 46.

Statement.

In order to enable the Court to expeditiously determine the issues in the case, the parties in this proceeding have divided the discussion of the issues presented for review. The brief herein, on behalf of the petitioners Kemp, Wright and Thomas, is principally devoted to discussion and analysis of the *scienter* issue, the conspiracy issue, and the issue with respect to the exclusion of evidence by the trial court. These issues are covered primarily by the Questions Presented numbered 1, 2, 3, 4 and 5. All of the remaining issues and questions presented, together with the extended Statement of the Case, appear in the companion brief being filed herein on behalf of the remaining petitioners,[2] and the petitioners herein adopt by reference, as if fully set forth at length, the aforesaid Statement of

[2]On the issues of *scienter* and conspiracy, the latter being essentially a specific intent crime, the discussion herein includes all of the petitioners.

the Case, together with the argument and the points of fact and law presented in said companion brief.

The Statement of the Case which follows is pertinent to the issues and questions presented in the brief and argument herein.

The charge in the indictment was that the book, "The Illustrated Report", was mailed from the Southern District of California (San Diego), where the place of business was located. On the other hand, the indictment charged that the advertisement, the brochure, was mailed from the Central District of California (North Hollywood) and that petitioners either aided or abetted said mailing or conspired to mail the said brochure. In this respect, the evidence adduced by the prosecution was as follows.[3]

Richard Harte and his wife, Venita Harte, doing business as Academy Addressing and Mailing Service [JA 122][4] were engaged in the business of performing a service for persons who wished to have commercial mailings. Their service consisted of the insertion of letters, brochures, and the like, into envelopes [JA 122]. Some time in January, 1971, Mr. Harte received a telephone call from a man named Bernard Lieberman on behalf of Regent House, located in North Hollywood, California [JA 123]. Mr. Harte learned later that Mr. Lieberman was a warehouseman for Regent House.[5] The sole service rendered by the Hartes was

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[3]The reference "JA" is to the Joint Appendix. The reference "R.T." is to the Reporter's Transcript of Proceedings. The reference "C.T." is to the Clerk's Transcript.

[4]The Hartes were named as unindicted co-conspirators in the indictment [JA 14].

[5]Bernard Lieberman, doing business as Regent House, North Hollywood, California, was named in the indictment as an unindicted co-conspirator [JA 14].

the insertion of the brochures and a return envelope into an outside envelope and the sealing thereof [JA 124]. The Hartes affixed postage to the envelopes through the use of a meter head owned and furnished by Regent House [JA 124-125]. Mr. Harte knew nothing about the corporate petitioners Library Services, Inc., and Reed Enterprises, Inc., or the corporate defendant Greenleaf Classics, Inc., and he had never had any dealings with nor did he know the petitioners Earl Kemp, Shirley Wright, David Thomas or William Hamling [JA 126, 127-128].

It should also be noted at this point that no officer or employee of Regent House, nor the aforesaid Bernard Lieberman, ever appeared at the trial to offer any testimony.

There is no evidence in the record of any kind as to who was responsible for the preparation of the contents of the advertisement.

Mrs. Harte, who worked with her husband, was responsible for the billing, and she billed Regent House for the services furnished by Academy Addressing and Mailing in the sum of $541.15 [Gov. Ex. 25; JA 129]. The Hartes did not personally mail the envelopes. They presumably were picked up by Regent House [JA 130]. All that Academy did was to send a bill to Regent House and get a check back [JA 132]. No name of any individual petitioner appeared on the envelopes or on the advertisements.

The government offered into evidence [Gov. Ex. 29-A; R.T. 770] a photocopy of a check drawn on the Regent House account in the amount of $3,300.00 to the United States Postmaster. According to the government, Regent House billed Reed Enterprises, Inc., in

the form of what was described at the trial as an adding machine tape [Gov. Ex. 47; R.T. 829], for a total sum of $4,102.27, which allegedly covered the amount billed by Academy, postage costs, and a few other minor items. Thereafter, on January 19, 1971, a check from Reed Enterprises to Regent House in the sum of $4,102.27 was introduced into evidence bearing the signature of petitioner William Hamling [Gov. Ex. 48; R.T. 830]. The government also introduced an invoice from London Press, Inc.,[6] of North Hollywood, California, to Reed Enterprises, Inc., in the amount of $3,817.80 [Gov. Ex. 54; R.T. 827], which allegedly constituted a charge for the printing of the brochures, and a check in the sum of $4,843.14 [Gov. Ex. 56; R.T. 828], which allegedly included payment for the aforesaid bill and some other item, was thereafter made out to London Press, Inc., bearing the signature of petitioner Hamling.

No officer, employee, or other person on behalf of London Press, Inc., ever testified at the trial.

The trial court's instructions, and the failure to instruct as requested, on the issue of *scienter* are discussed hereafter in the Argument which follows.

The petitioners, on their own behalf on the fundamental issues of obscenity and *scienter*, offered documentary evidence as well as oral testimony by expert witnesses. The categories of documentary evidence which the petitioners proposed to introduce included, first, comparable publications which had received second-class mailing privileges; second, comparable publications which had been adjudicated by the courts to

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[6]London Press, Inc., was also named in the indictment as an unindicted co-conspirator [JA 14].

be constitutionally protected; third, comparable material openly available on the newsstands with confirming testimony that such material had received a reasonable degree of acceptance, both in the local community (San Diego) and in the nation as a whole; and fourth, material used by the commission. The trial court held that the law permitted proof by an accused of community standards "either by comparables, by the introduction of comparables or by the introduction of expert witnesses". The court ruled that "comparables will not be permitted for this reason: primarily they tend to confuse the jury. They tend to set up matters that I feel would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom". The trial court therefore concluded that petitioners could produce expert witnesses, "but you are not permitted to use comparables in any manner before this jury" [JA 157-158].

Summary of Argument.

The government throughout the trial insisted that the sole standard for judging *scienter* under the statute and the indictment was proof of "knowledge of the contents" of the material. Both during the trial and in the instructions to the jury the court ruled out any requirement of proof beyond the nature and character of the contents of the material. The trial court specifically held that proof of the alleged obscene nature or character of the contents of the material was not a requisite standard, and that an honest belief on the part of an accused that the material was not obscene was not a valid defense. The trial court specifically instructed the jury that knowledge of the contents was the intent required, and that belief as to the obscenity or nonob-

scenity of the material was irrelevant. The Court of Appeals, relying upon the 1896 opinion of the Court in *Rosen v. United States*, affirmed that the sole standard for judging *scienter* was "knowledge of the contents".

Nothing in the statutory history of the federal obscenity statute indicates any purpose on the part of Congress to do away with the requirement of a guilty intent in order to ease the prosecution's path to conviction. The Comstock Act has always had a *scienter* provision. What the legislative history does make plain is that Congressional concern has always been that the line be properly drawn between the use of the mails for the dissemination of constitutionally protected materials and the use of the mails for the delivery of allegedly obscene materials. Legislative history, as well as decisions of this Court, indicate that the standards for judging *scienter* in obscenity prosecutions cannot be based solely on the notion that where obscenity is involved, all First Amendment inquiry is ended.

Determination of what sort of mental element is requisite to a constitutionally permissible prosecution under 18 U.S.C. §1461 is therefore of crucial significance in reaching the proper balance between the individual and societal interest in freedom of expression, and expression deemed so offensive as to be deprived of the guarantees of the Constitution. Prior decisions of this Court indicate that a majority of the Court has always felt that the standard for judging *scienter* in obscenity prosecutions includes, at the very least, proof of both knowledge of the contents of the material and awareness of the obscene character of the material. The stress has constantly been on *calculated* purveyance of

obscenity, and not the mere knowing dissemination of material dealing with sex.

It is important to distinguish between the problem of formulating a legal standard for judging *scienter* and the quality or quantity of proof required to meet such legal standard. The initial question is the applicable law, to wit, the instructions which a trial court is required to give to a jury in an obscenity prosecution. In formulating the appropriate standard, it should be initially noted that the only offense proscribed, and the only offense charged in the indictment, was the mailing of an obscene advertisement, that is, a brochure which allegedly was patently offensive because it affronted community standards relating to the description or representation of sexual matters; the dominant theme, taken as a whole, appealed to a prurient interest in sex; and was utterly without redeeming social value. The statute does not apply to all materials dealing with sex. It applies only to materials whose contents are obscene. By reason of the limiting construction given by the courts below to the standard for judging *scienter*, the petitioners herein, while charged in the indictment with knowingly mailing obscene material, were convicted solely of knowingly mailing material dealing with sex.

The standard for determining *scienter* must always be, it is submitted, knowledge of the essential facts which bring the obscenity law into play, and for this reason it is essential that the proof, in order to establish culpability, at the very least establish that the accused knew the contents of the material he was disseminating and was in some manner aware of its alleged obscene nature and character. If such guilty

knowledge be established, and the material is disseminated with specific intent to appeal to the prurient interest of the recipients, then the *mens rea* or *scienter* may be deemed established. There is virtually no area of the criminal law in which the general *mens rea* requirements for the establishment of liability do not include proof that an accused acted purposely and knowingly with respect to each material element of the offense. Moreover, unlike the ordinary criminal prosecution, obscenity prosecutions implicate First Amendment questions. Since the criteria for judging obscenity themselves contain a considerable degree of residual ambiguity, it is essential to avoid mistakes in fact finding by requiring clear and unequivocal evidence of guilty knowledge, as well as an intent based upon such knowledge to do the acts which constitute the harm against which the law is directed.

In *New York Times Co. v. Sullivan*, this Court concluded that the constitutional guarantees of the First Amendment prohibit a public official from recovering damages for a defamatory falsehood unless he proves with convincing clarity that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. It is anomalous that false and libelous utterances with respect to public officials or public issues should receive the high protection, as aforestated, while the liberty to discuss and inform and educate the public with respect to such matters of human interest as sex and sexual relations is undermined by the virtual elimination of any *scienter* requirement in obscenity prosecutions. It is submitted that the standards for judging *scienter* should include proof of guilty knowledge and calculated purveyance, to wit, proof of knowledge of the obscene nature and

character of the contents of the material and specific intent to appeal to the prurient interest, and that an accused's honest belief that the known contents of material are not obscene should constitute a defense in an obscenity prosecution.

Proof of knowledge of the contents of a publication dealing with sex cannot rationally be deemed the equivalent of knowledge of the alleged obscenity of the publication. It is unreasonable and arbitrary to draw an inference of knowledge of obscenity from mere proof of knowledge of contents. Empirical studies indicate that such inference is fallacious. Persons have been repeatedly arrested, tried and convicted under obscenity statutes, only to have the convictions overturned because in the opinion of the appellate courts the material involved was not obscene. Persons with extensive legal training and experience find it difficult to cope with the uncertainties which permeate the subject of obscenity. Judges, juries, prosecutors, defense attorneys and police are often uncertain or in error as to the alleged obscenity of the contents of a particular publication.

With due deference, it is time to recognize that the epigram contained in the *Rosen* opinion rendered in 1896 has lost its viability. The *Rosen* decision was based on the *Hicklin* standards, rejected by this Court as unconstitutionally restrictive of the freedoms of speech and press. The issue today cannot be notice of what is meant "by decency, purity and chastity in social life". The issue today is what expression dealing with

sex is entitled to the protective guarantees of free speech and press, and what is not. It cannot be reasonably argued that everyone must know today what is or what is not "obscene expression", when the courts as well as the community are in disagreement as to where and how the line should be drawn. The standards for judging obscenity rely upon subjective moral, aesthetic, sociological and psychological determinations by those charged with application of the law. To presume that one who merely knows the contents of a particular publication conclusively knows that the contents exceed such standards is to unfairly convict innocent persons. The existence of such a conclusive presumption can only induce self-censorship and make material protected by the Constitution unavailable to the public.

The argument of prosecutorial convenience is also without merit. Juries are regularly required to find a *mens rea* element in prosecutions under federal criminal statutes, and there is no reason to believe that prosecutors would have any special difficulty under a construction of the federal obscenity statute requiring proof of guilty knowledge and intent as heretofore discussed. A study of the results in federal and state obscenity prosecutions has demonstrated that prosecutors have no difficulty in proving the requisite *scienter*, even where such requisite included proof of the obscene nature of the materials involved.

There has never been any claim by the government that it proved the individual petitioners, or the corporate petitioners, knew that the brochure or advertise-

ment was obscene as alleged in the indictment. There has never been a claim that petitioners intentionally mailed the brochure with such knowledge, or that the mailing of the brochures was accompanied by any intent of the petitioners to appeal to a prurient interest. Moreover, the record in this case is barren of any relevant evidence to show that any of these petitioners even knew the contents of the brochure at the times when the brochure was mailed, as alleged in the indictment. An analysis of the record with respect to each of the petitioners makes clear that the essential elements of the offenses charged against these petitioners was never proven. There was no proof of knowledge of the contents. There was no proof that petitioners had anything to do with the preparation or mailing of this particular brochure, and there is simply no evidence that petitioners willfully and knowingly conspired to violate the federal obscenity statute. There is no proof of a corrupt agreement on the part of these petitioners or a specific intent to violate the federal obscenity statute.

The trial court excluded an entire category of evidence offered by petitioners which bore importantly on the issues of obscenity and scienter. The court stated that under no circumstances would it permit the jury to consider, nor would the court itself consider, any comparison of the contents of the material involved in the prosecution with that of other comparable material openly published, widely distributed and generally accepted by the community. Thus, the jury was permitted

to conclude that the material involved exceeded the limits of candor set by contemporary community standards without ever being permitted to receive evidence as to the kinds of explicit sexual material the community generally tolerates. There was no possible justification for wholly denying petitioners all opportunity to present an entire category of testimony in their defense, even to the extent of excluding comparable material held entitled to constitutional protection by this Court. The petitioners here were deprived of essential exculpatory testimony for no legitimate reason, it is submitted. The right to present evidence is essential to the fair hearing required by the Due Process Clause, and this right is fundamental when the proceeding results in finding that a particular individual is guilty of a crime.

ARGUMENT.

I.

The Standards for Judging Scienter in Obscenity Prosecutions Should Conform to the Free Speech and Press, Due Process, and Fair Trial Provisions of the First, Fifth and Sixth Amendments. Rigorous Standards Are Required to Assure the Public's Access to Constitutionally Protected Material, to Avoid Additional Ambiguity in the Definition of Obscenity, and to Guarantee That an Act With Innocent Intent Shall Not Be Deemed a Crime in Obscenity Prosecutions. Mere Proof of Knowledge of Contents Is Not Sufficient to Establish Guilty Knowledge. The Trier of the Facts Should Be Required to Find Beyond a Reasonable Doubt That the Accused Knew the Contents of the Material; Was Aware of the Obscene Character of the Contents; and With Such Knowledge and Awareness, Intentionally Disseminated the Material With the Specific Intent to Appeal to the Prurient Interest of the Recipient. An Honest Belief That the Known Contents of a Publication Are Not Obscene Should Constitute a Defense. The Rulings of the Courts Below, and the Instructions and Failures to Instruct as Requested, Deprived Petitioners of Rights Guaranteed by the Provisions of the First, Fifth, Sixth and Eighth Amendments.

A. In pretrial proceedings, on motions to dismiss the indictment and for a bill of particulars, the government repeatedly asserted that the allegation of knowledge in the indictment called for nothing more than "knowledge of the contents" of the material: "It is not claimed that each of the defendants knew that the materials charged in Counts 2 through 14 and 19 through 21 of the indictment were, in fact, obscene.

The allegation of knowledge in those counts calls for nothing more than knowledge on the part of each defendant as to the nature of the contents of each mailing. See *Rosen v. United States*, 161 U.S.29 (1896)." [JA47; R.T. Vol. D, 7-9].

The trial court stated during pretrial proceedings: "The government alleges in the indictment knowingly. We don't know whether the government means knowingly . . . put the book in the mail, knowingly put the book in the mail knowing its contents, or knowingly put the book in the mail knowing its contents to be obscene." [R.T. Vol. C, 77-78]. The trial court resolved the issue by stating that "I think that the matter of knowledge that the government has to prove is a matter of instructions at the time of trial" [R.T. Vol. C, 80].

The petitioners requested the trial court to instruct the jury that the mere fact that a petitioner knew the contents of the material did not, for that reason alone, justify an inference that the petitioner knew the material was obscene [JA 72]. There was a request to instruct the jury that the government must prove beyond a reasonable doubt that each of the petitioners knew that the material exceeded contemporary standards, appealed to prurient interest, and was utterly without redeeming social importance [JA 72]. Another instruction proposed by petitioners stated that if the jury believed that any petitioner was honestly ignorant of the alleged obscenity of the material, then such petitioner should be found not guilty [JA 72]. There was a further request to instruct the jury that even if the jury found that petitioners, or any of them, knew that the material dealt with sex and portrayed sexual activities, that fact, in and of itself, was insufficient

to support a finding that the petitioners, or any of them, were aware of the obscene character of the material [JA 73]. The trial court was also requested to instruct the jury that the statute required proof, in addition to guilty knowledge, of a specific intent to appeal to the prurient interest [JA 73]. All of the aforesaid petitioners' proposed instructions were rejected by the trial court.

During the hearing on the proposed instructions, the trial court made the following statement:

> "I give and will be giving 'Specific Intent' only as it relates to the application of the conspiracy, which is in the conspiracy instructions, and only as it relates to the specific intent to do the act, to-wit, placing the matter in the mail with knowledge of the contents of the material." [R.T. 4454].

The trial court insisted that the instruction with respect to *scienter* would be knowledge of the nature or character of the contents. Counsel for petitioners objected.

> "I know that your Honor has previously taken a position with regard to what the knowledge is. I think that the way it ought to read as a minimum would be that the defendants had knowledge of the nature and obscene character of the contents. Otherwise, your Honor, it is just putting in some jokers there that would not be meaningful at all. Whatever it means, I would like your Honor to tell us.
>
> "THE COURT: It means exactly what it says: The knowledge of the nature or character of the contents of the envelopes or packages." [R.T. 4470].

The trial court also indicated that it would give an instruction "that defendants' belief as to the obscenity of the material is immaterial, is irrelevant . . . That is, in my opinion, a correct statement of the law" [R.T. 4479].

The petitioners objected to all of the aforesaid failure to give petitioners' proposed instructions and to the instructions which the trial court proposed to give, as aforestated, on the issue of *scienter* [R.T. 4516-4517].

With respect to the offenses charged in the indictment, the trial court instructed the jury that the essential elements of the offense required to be proved beyond a reasonable doubt were willful depositing or causing to be deposited in the mails; "knowledge of the nature and character of the contents" of the material; and that the materials were obscene under the standards enunciated by the court [JA 229-230]. The trial court reiterated: "The requirement of knowledge in this case applies . . . to placing the subject material in the mails . . . and to the defendants' knowledge as to the contents of the envelopes and packages, and that is the intent required." [JA 235]. It must be proven beyond a reasonable doubt, stated the trial court, that petitioners had "knowledge of the character of the materials"; that the petitioners "were aware of the character and the nature of the materials"; but that petitioners' "belief as to the obscenity or non-obscenity of the material is irrelevant" [JA 235-236].

> "An act is willfully done, as I have stated before, if it is done voluntarily and intentionally and with the specific intent to do something the law forbids or, in this case, with the specific intent or knowledge of the contents of the package. . . . It is

ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted." [JA 237].[7]

Following the giving of instructions, petitioners once again requested the trial court to instruct the jury as to precisely what was meant by "knowledge of the character of the material". Petitioners urged that the jury be instructed that there must be at least proof of knowledge of the "obscene character" of the material. [JA 259]. Petitioners specifically objected to the court's instruction that belief on the part of petitioners that the material was not obscene was irrelevant and urged that proof of knowledge of obscenity or good faith belief in the non-obscenity of the material was relevant [JA 261].

The Court of Appeals adopted as the standard for judging *scienter* in federal obscenity prosecutions the rule enunciated by a district judge in *United States v. Rubin*, 312 F.Supp.950 (D.C. Cal. 1970). The court held that all that the government is required to prove is that "the defendant knew the contents" of the material. No other obligation is placed upon the government, stated the Court of Appeals, relying upon the decision of the Court in *Rosen v. United States*, 161 U.S.29 (1896). It again appeared to the Court of Appeals, in the year 1973, that: ". . . Every one who uses

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[7]During the course of his instructions, the trial court stated to the jury as follows: ". . . [I]f you believe the advertisements themselves to be obscene, the book not to be obscene, then the defendants would be guilty of counts 2-5 and 7-13 . . ." [JA 231-232]. Petitioners objected that the language of the instruction left the jury free to convict if they found the brochure obscene, without any reference to "knowledge" [JA 260]. See, *United States v. Hayward*, 420 F.2d 142, 143-144 (D.C. Cir. 1969).

the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd, and lascivious." (Appendix A, Petition for Writ of Ceriorari, pp. 21-24).

B. While the statutory history of 18 U.S.C. §1461 is meager on the issue of criminal intent, nothing in that history indicates any purpose on the part of Congress to do away with the requirement of a guilty intent in order to ease the prosecution's path to conviction. Congress did not intend to eliminate proof of *scienter* in obscenity prosecutions, which was required at common law, nor did Congress intend to deprive juries of their freedom to decide that if an unlawful act had occurred, the accused had not intended to cause it. From the outset, the Comstock Act has always had a *scienter* provision. See, Paul and Schwartz, *Federal Censorship*, "Obscenity in the Mail" 257 (1961).

What the legislative history of 18 U.S.C. §1461 does reveal with clarity is that Congress has been concerned with the line to be drawn between the use of the mails for the delivery of allegedly obscene materials and the use of the mails for the dissemination of constitutionally protected materials. Justice Holmes appropriately sensed the legislative intent when the Justice stated: "The United States may give up the postoffice when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues and it would take very strong language to convince me that Congress ever intended to give such a practically depotic power to any one man [Postmaster General]." *United States v. Burleson*,

255 U.S.407, 437. When the Act of 1876 was being debated in Congress, James Garfield made the following observations:

> ". . . We ought to be exceedingly careful in all our legislation touching this subject . . . Where freedom of opinion and of the press lie on the border of obscenity is a difficult question, and I would be glad if the committee . . . would consent to reference of this bill to the Committee on the Judiciary . . . in order that they may go over the whole subject and inquire whether we have not used terms too broad and too general in the original bill . . ." Paul and Schwartz, *supra*, 258.[8]

The real issue which has confronted Congress and the courts in this area is the need for the development of proper standards in the light of the breadth and scope of the free speech and press provisions of the First Amendment, together with the public's right to be informed on all matters of human interest, as contrasted with the more limited right of the federal government in the obscenity area. See, opinion of Justice Harlan in *Roth v. United States*, 354 U.S. at 504; *Lamont v. Postmaster General*, 381 U.S.301; *Blount v. Rizzi*, 400 U.S.410.

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[8]Another provision of the Comstock Act also made nonmailable every article or thing "designed, adapted or intended" for illegal contraception or abortion. The Reviser's Notes to 18 U.S.C. §1461 call attention to the rulings of the courts holding that the said provisions of the law should not be construed literally, and that the more reasonable interpretation is to construe the whole phrase as requiring an intent on the part of the sender that the article mailed or shipped be used for illegal purposes. In *Davis v. United States*, 62 F.2d 473 (6 Cir. 1933), judgments of conviction were reversed, the court holding that proof of the intent of a person mailing a circular conveying information for preventing conception should include proof that the circular was intended for an illegal purpose.

The Court has consistently recognized the importance of establishing standards which will distinguish between speech entitled to constitutional protection and expression which allegedly falls outside the ambit of the First Amendment. In *Roth*, the Court stated: "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." 354 U.S. at 488. In *Smith v. California*, 361 U.S.147, 155, it was held: "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power . . . It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." In *Manual Enterprises, Inc. v. Day*, 370 U.S.478, 492, Justice Harlan stated: "Congress has required *scienter* in respect of one indicted for mailing material proscribed by the statute. In the constitutional climate in which this statute finds itself, we should hesitate to attribute to Congress a purpose to render a publisher civilly responsible for the innocuous advertisements of the materials of others, in the absence of any showing that he knew that the character of such materials was offensive." Even as late as June 21, 1973, a sharply divided Court was still striving to arrive at standards capable of distinguishing obscene material unprotected by the First Amendment, from protected free speech. *United States v. Orito*, 413 U.S. 139.

It therefore appears that the standards for judging *scienter* in obscenity prosecutions cannot be based solely on the notion that where obscenity is involved, all

first amendment inquiry is ended, and that proof of culpability in a case involving alleged obscene expression is no different from a case involving gambling paraphernalia or other contraband. The Court has emphasized: "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co. v. Sullivan,* 376 U.S.254, 269.

What sort of mental element is requisite to a constitutionally permissible prosecution under 18 U.S.C. §1461 is of crucial significance in reaching the proper balance between the individual and societal interests in freedom of expression, and expression deemed so offensive as to be deprived of the guarantees of the Constitution. "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall,* 357 U.S.513, 521.

C. It will be helpful, it is submitted, at this point to review briefly the rulings of the Court heretofore made with respect to the requirement of *scienter* in obscenity prosecutions.

When the Court initially promulgated the standards for judging obscenity in *Roth-Alberts,* the Court rejected the claim that the standards were too vague to satisfy the constitutional requirements of due process. The Court pointed to a series of decisions which upheld

criminal statutes as against claims that such statutes failed to provide adequate notice of what was prohibited. 354 U.S. at 492.[9] It is significant that in all of the cases cited, the statutes involved, while indefinite, concerned conduct which was objectively measurable; yet in each case the Court emphasized the requirements of proof of knowledge and specific intent, in order to save the statutes from constitutional infirmity. See, *United States v. Petrillo*, 332 U.S.1, 7-8 (specific intent to coerce with knowledge that additional employees were not needed); *United States v. Harris*, 347 U.S.612, 624, fn.15 (lobbying statute applies only to persons who intentionally solicited money for the purpose of defeating legislation); *Boyce Motor Lines, Inc. v. United States*, 342 U.S.337, 340 (government must show that petitioner knew that there was a practicable, safer route and yet deliberately took the more dangerous route); *United States v. Ragen*, 314 U.S.513, 523-524 (statute punishes only those who willfully attempt to defeat the law and who act in bad faith and who make intentional deduction of dividends in the guise of compensation for personal services); *United States v. Wurzbach*, 280 U.S.396 (statute punished intentionally solicited contributions); *Hygrade Provisions Co. v. Sherman*, 266 U.S.497, 502-503 (statute requires a specific intent to defraud); *Fox v. State of Washington*, 236 U.S.273 (statute construed as confined solely to acts which encourage an actual breach of the law); *Nash v. United States*, 229 U.S.373, 376 (statute applies only to contracts and combinations which, by reason of intent or the inherent contemplation of the accused, result in the restriction of competition).

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[9]The same cases were repeated in *Miller v. California*, 413 U.S.15, n. 10.

The assumption that proof of guilty knowledge and specific intent to commit a public wrong tends to mitigate the inherent ambiguity of obscenity statutes is implicit in the *Roth* decision. As Chief Justice Warren stated in *Roth-Alberts:* "The personal element in these cases is seen most strongly in the requirement of *scienter* . . . The federal statute limits the crime to acts done 'knowingly'. In his charge to the jury, the district judge stated that the matter must be 'calculated' to corrupt or debauch." 354 U.S. at 495.

In *Smith v. California,* 361 U.S.147, the Court was presented with an attempt by the municipality to impose a strict or absolute criminal responsibility in obscenity prosecutions. The local ordinance permitted convictions even without minimal proof that the accused knew the contents of the material involved. The Court held that the elimination of the *scienter* requirement would "tend to work a substantial restriction on the freedom of speech and of the press . . . but our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold . . . The bookseller's self-censorship, compelled by the State to be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded". 361 U.S. at 150-154.

Concurring in *Smith v. California,* Justice Black stated: "The Court invalidates the ordinance solely because it penalizes a bookseller for mere possession of

an 'obscene book', *even though he is unaware of its obscenity*." 361 U.S. at 156. (Emphasis added). Justice Frankfurter, in his concurring opinion, stated that as he understood the Court's opinion, it was holding "that one cannot be made amenable to such criminal outlawry unless he is chargeable *with knowledge of the obscenity*". 361 U.S. at 161. (Emphasis added). In the view of Justice Frankfurter, what was being left open for future decision was the quantity and quality of proof necessary to establish such guilty knowledge. 361 U.S. at 161-163. Justice Harlan, concurring in part and dissenting in part, expressed the view, which he had often expressed, that "the *scienter* question involves considerations of a different order depending upon whether a state or a federal statute is involved", 361 U.S. at 170, and it is clear from the subsequent decision by Justice Harlan in *Manual Enterprises, Inc. v. Day*, 370 U.S.478, that in federal prosecutions Justice Harlan would require proof of knowledge of obscenity as a standard for judging *scienter*.

In *Manual Enterprises, Inc. v. Day*, 370 U.S.478, the question posed by Justice Harlan was whether 18 U.S.C. §1461 could be construed as not requiring proof that the publishers knew that some of their advertisers were offering to sell obscene materials. It was conceded that *scienter* was required in a criminal prosecution under §1461, but the government contended that such requirement was unnecessary in a civil proceeding. Justice Harlan rejected the argument of the government. It was held that Congress could not have intended, and that it was probably constitutionally impermissible, to hold the publisher civilly responsible for the advertisements of the material, in the absence of any showing that he knew that the character of such material

was offensive. The government made the additional argument that some of the publishers' magazines contained notations which appeared to give some indication that the publishers were familiar with the work of the advertisers. Nevertheless, the Court held that "this cannot well be taken as an admission of *knowledge* that the advertisers' works were *obscene*". 370 U.S. at 493, fn. 16 (emphasis added).

In *Mishkin v. New York*, 383 U.S.502, a claim was made that the New York obscenity statute was constitutionally invalid because of the lack of requirement of *scienter*. In rejecting this argument, the Court observed that the same statute had been previously construed by the highest court of the State (*People v. Finkelstein*, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470 [1961]) to require the "vital element of scienter". The Court noted that the state court in *Finkelstein* had defined "scienter" in the following terms: "A reading of the statute [§1141] as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised." Justice Brennan, in quoting the aforesaid construction by the state court, added the emphasis which appears in the quotation.

The State, in *Finkelstein*, had argued that *scienter* in obscenity prosecutions meant no more than knowledge of "contents" of the material, apparently taking out of context the use of the same word by Justice Brennan, in *Smith v. California*. To clarify this issue, Justice Brennan, in *Mishkin*, not only emphasized that there must be an *intentional purveyance* of obscenity,

but that the use of the words "knowledge of the contents" of the material, by a state court judge in a subsequent opinion in the same *Finkelstein* case, could not be considered "as a modification of this definition of scienter" which had been enunciated by the state court in its first opinion. 383 U.S. at 510, fn. 9. Justice Brennan added the following: "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." 383 U.S. at 511.

Finally, in *Ginsberg v. New York*, 390 U.S.629, where the validity of a statute specifically prohibiting sales to minors of obscene materials harmful to them was upheld, the *scienter* requirement included proof of knowledge of "the character and content of any material described herein". Justice Brennan referred again to the decision in *Mishkin*, emphasizing the state court's interpretation of the *scienter* requirement (*People v. Finkelstein*) as meaning that it was not innocent but *calculated* purveyance of obscene materials which was forbidden. Justice Brennan noted that the attention of the New York legislature had been directed to the state court decision defining the nature of *scienter* as required to sustain the statute. The Justice therefore concluded that it was reasonable to infer that the reference in the statutory provision "to knowledge of the *character* and content of any material described herein" incorporated "the gloss given the term 'character' in People v. Finkelstein". 390 U.S. at 644.

With deference, this review of past decisions by the Court indicates that a majority of the Court has always felt that the standard for judging *scienter* in ob-

scenity prosecutions includes, at the very least, proof both of knowledge of the contents of the material and awareness of the obscene character of the material. The stress has constantly been on *calculated* purveyance of obscenity, and not the mere knowing dissemination of material dealing with sex.

D. Petitioners therefore discuss at this point the basic question presented on the issue of *scienter*, to wit, what are the requisite constitutional standards pertaining to the scope of *scienter* in obscenity prosecutions? Petitioners are addressing themselves at this stage to the question of the applicable law, to the law of the case, to the instructions which a trial court is required to give to a jury in an obscenity prosecution. The discussion here is concerned with the legal standard for judging *scienter*, and not with the quality or quantity of proof required to make prosecutions for obscenity constitutional. This distribution was glossed over by the courts below, but petitioners submit that the distinction is fundamental and significant. If a court does not define the elements of the offense with which an accused is charged and being tried, the jury is given no opportunity of applying the facts to the law. The submission of a case to a jury without accurately defining the offense charged and its elements is a grave error. "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial." *Screws v. United States*, 325 U.S.91, 107. See also, *Bollenbach v. United States*, 326 U.S.607, 613-614; *United States v. O'Dell*, 462 F.2d 224 (6 Cir. 1972); *United States v. Mus-*

grave, 444 F.2d 755, 763-765 (5 Cir. 1971); *United States v. Squires*, 440 F.2d 859 (2 Cir. 1971); *United States v. Krosky*, 418 F.2d 65, 67-68 (6 Cir. 1969); *Byrd v. United States*, 342 F.2d 939 (D.C. Cir. 1965); *Morris v. United States*, 156 F.2d 525 (9 Cir. 1946); Wright, Federal Practice and Procedure: Criminal §487; 53 Am.Jur, Trial §545.

The statute here, at the time the judgments of conviction were rendered, made it an offense to use the mails for the mailing of *obscene* material. The indictment charged petitioners with conspiring to mail, and mailing, an *obscene* book and advertisement. The case was tried under the *Roth-Memoirs* standards for judging obscenity. In short, the only offense proscribed in 18 U.S.C. §1461, and the only offense charged in the indictment, was the mailing of a book and advertisement which were allegedly patently offensive because they affronted contemporary community standards relating to the description or representation of sexual matters; the dominant theme of the material, taken as a whole, appealed to a prurient interest in sex; and the material was utterly without redeeming social value. These were, in accordance with decisions of this Court, the elements of the offense which were required to coalesce and to be established by the prosecution.[10]

One is ordinarily not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. In *Morissette v. United States*, 342 U.S.246, 270-271, the defendant was convicted of

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[10]In promulgating the Miller standards, the majority opinion referred to the issues of "community standards", "prurient interest" and "patent offensiveness" as "essentially questions of fact" (93 S.Ct.2618), a recognition that these standards, together with "conduct specifically defined by the applicable state law", constitute the essential elements of the offense.

knowingly converting to his own use property of the United States. In holding that criminal intent was an essential element of the crime, Justice Jackson, writing for a unanimous Court, made the following statement:

> "Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions. Knowledge, of course, is not identical with intent and may not have been the most apt words of limitation. But knowing conversion requires more than knowledge that defendant was taking the property into his possession. *He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion.* In the case before us, whether the mental element that Congress required be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt. For it is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property." (Emphasis added).

The statute here does not apply to all materials dealing with sex. It applies only to materials whose contents are *obscene*. It is impossible, it is submitted, to ascribe culpability to an accused in an obscenity prosecution when the proof allegedly shows only that the accused knew the "contents" of the material, or only knew that the contents dealt with "sex". In the case herein, the jury was specifically instructed that proof of knowledge of obscenity or belief in non-obscenity was entirely irrelevant. The court specifically refused

to instruct the jury that the proof required was knowledge of the contents together with awareness of the *obscene* nature and character of the contents. Thus, petitioners were charged in the indictment with knowingly mailing *obscene* material, and convicted of knowingly mailing material *dealing with sex.*

Petitioners do not contend that proof of knowledge of the existence or meaning of the obscenity law on the part of an accused is necessary in an obscenity prosecution. Petitioners do contend that proof, in order to establish culpability, must show that the accused knew the contents of the material he was disseminating and was in some manner aware that the material went beyond accepted contemporary standards in the depiction or representation of sex, appealed to a prurient interest, and was utterly without any social value or importance. If such knowledge and awareness is established, and the material is disseminated with specific intent to appeal to the prurient interest of the recipients, then the *mens rea* or *scienter* may be deemed established. The proof with respect to an accused's state of mind may be direct or circumstantial; but the standard for determining *scienter* must always be, it is submitted, knowledge of the essential facts which bring the obscenity law into play. It is not necessary to establish, for example, that the accused knew that the Court had promulgated a "prurient interest" test. It is essential that the prosecution prove that the accused knew that the material disseminated by him appealed to a prurient interest and that the accused intended by such dissemination to appeal to such interest.

There is virtually no area of the criminal law in which the general *mens rea* requirements for the establishment of liability do not include proof that an ac-

cused acted purposely and knowingly with respect to each material element of the offense. Certainly this is true where the offense is deemed a felony and carries heavy penalties of fine and imprisonment. A partial list of cases would include the following: *United States v. Jiminez-Serrato*, 451 F.2d 523 (5 Cir. 1971) (one charged with passing counterfeit bills under 18 U.S.C. §472 cannot be convicted without proof that the accused knew the *counterfeit* nature of the bills); *United States v. Gardner*, 171 F.2d 753 (7 Cir. 1948) (an agreement to transport a motor vehicle in interstate commerce without knowledge that it was stolen, or an agreement to transport or cause to be transported checks in interstate commerce without knowledge that they were fraudulent or forged, would not constitute a criminal conspiracy); *United States v. Nitti*, 444 F.2d 1056 (7 Cir. 1971) (without knowledge on the part of the defendant that property was "stolen", the charge that defendant was in possession of such stolen property could not be maintained); *Fulbright v. United States*, 91 F.2d 210 (8 Cir. 1937) (while the proof showed harboring, it failed to establish the requisite knowledge that the federal warrants had been issued for the arrest of the criminals); *United States v. Gallishaw*, 428 F.2d 760 (2 Cir. 1970) (erroneous instructions permitted conviction for aiding and abetting robbery of a bank without proof that the accused knew a bank was to be robbed); *United States v. Fields*, 466 F.2d 119 (2 Cir. 1972) (the trial court failed to instruct that the government had to prove that the defendants "actually knew" that the material in tractor trailer was stolen property); *United States v. Spingola*, 464 F.2d 909 (7 Cir. 1972) (the instructions of the trial court never made clear that "negligent failure"

to timely file would not constitute a "wilful failure" to file, thus precluding the jury's consideration of impossibility or other justifiable excuse as a defense).

See also, *United States v. Murdock*, 290 U.S.389; *Spies v. United States*, 317 U.S.492; *United States v. Bishop*, 412 U.S.346; Model Penal Code, Tentative Draft No. 4 (1955) pages 12-18, 123-139; Abelson & Crow, "The Scienter Element in California's Obscenity Laws: Is There a Way to Know?", in 24 Hastings Law Journal 1303-1325 (1973); Copes, "The Mens Rea Provisions of the Proposed Ohio Criminal Code—The Continuing Uncertainty", in 33 Ohio State Law Journal 354-396 (1972).

Moreover, unlike the ordinary criminal prosecution, obscenity prosecutions implicate First Amendment questions. An obscenity prosecution deals with forms of expression, with communication, with subject matter ordinarily entitled to the free speech and press protections of the Constitution. The separation of constitutionally protected material from that which is not entitled to constitutional protection is one of great societal importance. Concededly, such terms as "community standards", "prurient interest", "utterly without redeeming social value", or lacking "serious literary, artistic, political or scientific value", contain a considerable degree of residual ambiguity. It is therefore essential to avoid any mistakes in fact finding by requiring clear and unequivocal evidence of guilty knowledge as well as an intention based upon such knowledge to do the acts which constitute the harm against which the law is directed. See, *United States v. Falcone*, 311 U.S. 205; *Estep v. United States*, 140 F.2d 40, 45 (10 Cir. 1943).

In *Screws v. United States*, 325 U.S.91, an indictment was rendered against certain police officers, charging them with a violation of federal statutes which made it an offense to deprive any person of rights, privileges or immunities secured or protected by the Constitution and laws of the United States. The statute was challenged as being unconstitutionally vague because essentially it punished any violation of the Due Process Clause of the Fourteenth Amendment, and it was argued that the Due Process Clause has received such broad and fluid definitions that the statute provided, as a result, no ascertainable standard of guilt.

> ". . . Under that test a local law enforcement officer violates §20 and commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law. And he is a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee. The treacherous ground on which state officials—police, prosecutors, legislators, and judges—would walk is indicated by the character and closeness of the decisions of this Court interpreting the due process clause of the Fourteenth Amendment." 325 U.S. at 97.

This Court recognized the injustice of the enforcement of the federal statute involved in *Screws* if construed to only require proof of a general criminal intent. The Court held that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague statute invalid. "The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is

in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware". 325 U.S. at 102. Thus, the Court held that the word willfully in the statute must be construed as connoting a purpose to deprive a person of a specific constitutional right.

> "The difficulty here is that this question of intent was not submitted to the jury with the proper instructions. The court charged that petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from the prisoner's alleged assault. But in view of our construction of the word 'willfully' the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal. And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like." 325 U.S. at 106-107.

See also, *Dennis v. United States*, 341 U.S.494; *Hartzel v. United States*, 322 U.S.680.

In *New York Times Co. v. Sullivan*, 376 U.S.254, this Court recalled the historic statement that "It is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing

public characters and measures". 376 U.S. at 275, n. 15. The Court held that the rule applied by the Alabama courts which resulted in a judgment following a jury verdict awarding damages in the sum of $500,000.00 "is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent". 376 U.S. at 264-265. This Court held that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct" (376 U.S. at 273), and that the state rule of law with respect to libel could not be saved by its allowance of the defense of truth.

> ". . . A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in Smith v. California, 361 U.S.147, 80 S.Ct.215, 4 L.Ed. 2d 205, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale." 376 U.S. at 278.

The Court concluded that the constitutional guarantees of the First Amendment require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not". 376 U.S. at 279-280.

It is anomalous, it is submitted, that false and libelous utterances with respect to public officials or public issues should receive the high protection accorded by the ruling of the Court in *New York Times Co.*, while the liberty to discuss and inform and educate the public with respect to such matters of human interest as sex and sexual relations is undermined by the virtual elimination of any *scienter* requirement. If the constitutional guarantee of freedoms of speech and press with respect to issues of sex are to be preserved, then, it is submitted, an essential element of the offense in obscenity prosecutions is proof beyond a reasonable doubt that the accused knew the contents of the material involved, was aware of the obscene character of the contents, and disseminated the material with specific intent to appeal to the prurient interest.

The courts below adopted a standard for judging obscenity, to wit, knowledge of the contents of the material, which virtually eliminates any *scienter* requirement and restores the rule of absolute criminal liability. The government has never contended and does not claim that any of these petitioners was in any manner aware of the operative facts which bring the provisions of 18 U.S.C. §§371 or 1461 into play. In short, there was never any attempt to prove that these petitioners had any knowledge that the brochure allegedly exceeded contemporary community standards, or appealed to prurient interest, or was utterly without social value. There was no attempt to prove that these petitioners acted in reckless disregard of whether or not the brochure allegedly fell within the purview of the federal obscenity statute. There was no proof that these petitioners even intended to commit a public wrong. The jury was permitted to find culpability without a con-

stitutionally permissible standard for judging *scienter* and, as appears hereafter, without proof of culpability on the part of these petitioners, or any of them.

Moreover, the standards for judging *scienter* would not be complete, it is submitted, without providing that an accused's honest belief that the known contents of material are not obscene should constitute a defense in an obscenity prosecution. The importance of encouraging dissemination of constitutionally protected material justifies the enunciation of such a rule. See, Lockhart & McClure, "Censorship of Obscenity: The Developing Constitutional Standards", in 45 Minnesota Law Review 5, 106-108 (1960). While the question of the honesty of an accused's belief in the non-obscenity of material is always a matter for the trier of the facts to decide, it is submitted that it would be arbitrary and capricious, as well as harmful to the exercise of freedoms of speech and press, to deprive an accused of a defense of honest belief that the material was not obscene. The deprivation of such a defense would also result in self-censorship in the face of absolute criminal liability, with resultant injury to the public's access to constitutionally protected material.[11]

E. The argument that proof of mere "knowledge of contents" is sufficient to support a judgment of con-

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[11]The indictment failed to particularize the constitutionally requisite element of *scienter*. The trial court itself, in pretrial proceedings, recognized that the word "knowingly" in the indictment could have many meanings [R.T. Vol. C, 78]. See, *Russell v. United States*, 369 U.S.749; *Pettibone v. United States*, 148 U.S.197; *United States v. Carll*, 105 U.S.611; *United States v. Denman*, 483 F.2d 1093, 1097 (8 Cir. 1973). See also, *Rabe v. Washington*, 405 U.S.13; *DeJonge v. Oregon*, 299 U.S.353, 362; *Cole v. Arkansas*, 333 U.S.196. Even the Grand Jury was presented with no evidence on the essential element of *scienter* except corporate records [R.T. Vol. D, 20].

viction in a federal obscenity prosecution is without support in reason or logic. In the first place, if it is argued that a jury may reasonably infer knowledge of *obscenity* merely from proof of *knowledge of contents*, then the judgments of conviction in the case herein would nevertheless be invalid because the jury was never instructed that they were required to find knowledge of obscenity on the part of the petitioners.

In the second place, knowledge of the contents of a publication dealing with sex cannot possibly be the equivalent of knowledge of the alleged obscenity of the publication. The mere proof that a publisher or editor knew the contents of the newspaper involved in *Kois v. Wisconsin*, 408 U.S.229, could in no way establish that such publisher or editor knew that the newspaper was obscene, as the judgment of this Court, reversing the holding of the Wisconsin Supreme Court, makes amply clear. Knowledge of the contents of the magazines and films involved in *Wiener v. California*, 404 U.S.988, and *Hartstein v. Missouri*, 404 U.S.988, did not establish that the publishers or distributors of such material knew that it was obscene. Proof that publishers, producers, exhibitors, distributors, or others similarly situated, knew the contents of the multifold books, magazines and films ultimately held to be entitled to constitutional protection by this Court and other courts plainly fails to establish that such persons knew the material was "obscene".

Further, empirical studies indicate that it is unreasonable to assume knowledge of obscenity solely from proof of knowledge of contents or character of the material. As aforementioned, persons have been repeatedly arrested, tried and convicted under obscenity statutes, only to have their convictions overturned

by federal and state courts because in the opinion of such courts the material involved was not, in fact, obscene. Even persons with extensive legal training and experience with obscenity laws "feel hamstrung by the gaping uncertainties which permeate the subject". Abelson & Crow, "The Scienter Element in California Obscenity Laws: Is There a Way to Know?", in 24 Hastings Law Journal at 1318. Nor can a person determine obscenity by knowledge of contents by "reference to the pattern of enforcement of obscenity laws". *Ibid.*, p.1318. Even the prosecutorial arm of the government is not always certain as to whether the contents of material constitutes obscenity. The fact is that "judges, juries, prosecutors, defense attorneys, and the police are often uncertain or in error as to the obscenity *vel non* of a particular film or book". *Ibid.*, at 1321.

If an accused may be convicted without any proof that he knew that the material was obscene, and without any possibility of establishing in his own defense his honest ignorance that the material was obscene, then the trial of an obscenity prosecution becomes inherently unfair, and the right to confront witnesses, to present evidence in one's own behalf, and to have the assistance of counsel and a determination by an impartial jury become meaningless. Such a determination by a jury, based on its own subjective predilections, is no more than an *ex post facto* determination which visits upon the accused cruel and unusual punishment in the most primary sense of the terms.

The notion that everyone "must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious" has been rendered un-

tenable by the decisions of this Court since *Roth*, through *Jacobellis*, *Memoirs*, *Ginzburg*, *Redrup*, *Stanley*, and the June 21 decisions, as well as by the changing social conditions, attitudes, and sexual revolution of the past decades. See, *Griswold v. Connecticut*, 381 U.S.479; *Eisenstadt v. Baird*, 405 U.S.438; *Doe v. Bolton*, 410 U.S.179; *Roe v. Wade*, 410 U.S.113; *United States v. Klaw*, *Commission on Obscenity and Pornography*, September 1970.

With due deference, it is time to recognize that the epigram contained in the *Rosen* opinion rendered in 1896 has lost its viability. The standards for judging obscenity in *Rosen* were the *Hicklin* standards, "judging obscenity by the effect of isolated passages upon the most susceptible persons". *Roth v. United States*, 354 U.S. at 489. Under such a test, virtually any expression contained in a book or other medium of communication might be deemed "obscene" by a court or jury. But this Court has held that the *Hicklin* test "must be rejected as unconstitutionally restrictive of the freedoms of speech and press". 354 U.S. at 489. Moreover, the *Rosen* decision was rendered long before the developing standards with respect to freedoms of speech and press had been enunciated by this Court.

The issue today cannot be notice of what is meant "by decency, purity and chastity in social life". The issue today is what expression dealing with sex is entitled to the protective guarantees of free speech and press contained in the First Amendment, and what expression pertaining to sex is not so protected because the expression exceeds contemporary community standards, appeals to prurient interest, and is utterly without redeeming social importance, or lacks serious literary, artistic,

political or scientific value. It cannot be reasonably argued that everyone must know today what is or what is not obscene expression, when the courts as well as the community are in complete disagreement as to where and how the line should be drawn. See the dissenting opinions in the *Miller* and related cases of June 21 and June 25, 1973; *United States v. Friedman*, ... F.2d .... (10 Cir. Nos. 72-1143-1144, December 11, 1973); *United States v. Palladino*, F.2d .... (1 Cir. No. 72-1005, January 5, 1974); *United States v. Henson*, ... F.2d .... (9 Cir. No. 73-2063, October 5, 1973); Leventhal, "The 1973 Round of Obscenity-Pornography Decisions", in 59 American Bar Association J. 1261-1266 (1973); *Report of the Commission on Obscenity and Pornography* 358-362 (1970); Johnson, "The Pornography Report: Epistemology, Methodology and Ideology", in 10 Duquesne Law Review 190-219 (1971).

It cannot be denied that the standards for judging obscenity are not based upon common experience nor capable of objective measurement. The standards rely upon subjective moral, aesthetic, sociological and psychological determinations by those charged with application of the law. The test for judging obscenity does not even depend upon the proof of any alleged damages or harmful effects. It deals with judgment relative to "appeal of material", "patent offensiveness", and "social values". Such standards cannot possibly be presumed to be known merely from knowledge of the contents of particular publications. To draw such a presumption is to unfairly convict persons who honestly believed they were not disseminating material later held to be obscene. Moreover, the existence of such a presumption can only induce self-censorship and make ma-

terial entirely protected by the Constitution unavailable to the public.

If *Rosen* was intended to imply that "judicial notice" is sufficient to replace proof of culpability, then, it is submitted, a constitutional infirmity is clearly presented, for such type of notice would be a deprivation of due process, a failure to protect the individual against arbitrary action. In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S.292, the Court stated: "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record . . . This is not the fair hearing essential to due process. It is condemnation without trial . . . to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial . . . This will never do if hearings and appeals are to be more than empty forms." 301 U.S. at 300-302.

The presumption that everyone knows what is meant by "decency, purity and chastity" and what must be deemed "obscene, lewd and lascivious" is an irrational presumption, especially so since under the rulings of the courts below such presumption has been made irrebuttable and conclusive. Congress has never created such a presumption, and this Court has held that "incriminating presumptions are not to be improvised by the judiciary". *Morissette v. United States*, 342 U.S. 246, 275. The *Rosen* presumption, if adopted today, effectively eliminates all *scienter* as an ingredient of the offense. It is unreasonable, it is submitted, for a trial court to even instruct a jury that knowledge of obscenity can be inferred merely from proof of knowledge of

contents, and it is error to refuse to instruct a jury that such an inference cannot be drawn. Once it is accepted that a significant proportion of the community does not know and cannot know, merely from examining the contents of material, that such material exceeds contemporary standards, appeals to prurient interest, and is utterly without value, then there can no longer be conviction under the federal obscenity statute without proof that the particular accused was so aware. See, *Leary v. United States*, 395 U.S.6, 37-54. See also, *Tot v. United States*, 319 U.S.463; *Manley v. Georgia*, 279 U.S.1; *Bailey v. Alabama*, 219 U.S.219; *Eastern & Atl. R. Co. v. Henderson*, 279 U.S.639.

F. It is constantly urged by prosecutors that prescribing the constitutional standards for judging *scienter*, as heretofore discussed, would make it difficult to prove the requisite *scienter* and obtain convictions. It is argued that a "flood" of obscene materials will inundate the mails unless the *scienter* requirement is so diluted as to virtually eliminate this element of the offense. There is no empirical evidence to support these assertions by prosecutors, and in fact the evidence is quite to the contrary.

This Court stated in *Smith v. California*, 361 U.S. 147, 154: "We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind." In *United States v. Stagman*, 446 F.2d 489 (6 Cir. 1971), where the court interpreted 18 U.S.C. §1952 as requiring

proof of knowledge and specific intent to carry on an unlawful activity, the argument was made by the prosecution that such decision imposed "additional burdens on federal prosecutors seeking to extirpate organized crime operating across state lines". 446 F.2d at 493. The Court of Appeals replied: "Juries are regularly required to find a *mens rea* element in prosecutions under other statutes involving interstate activity such as the Dyer Act, 18 U.S.C. §2312, and the Mann Act, 18 U.S.C. §§2421 et seq., and there appears no reason why they would have any special difficulty under our construction of this legislation." 446 F.2d at 494.

If prosecutors are required to prove an intent to overthrow the government as speedily as circumstances will permit; an intent to pass counterfeit bills, knowing the same to be counterfeit; an intent to receive stolen property in interstate commerce, knowing the same to have been stolen; or an intent to steal or knowingly convert property belonging to the United States, there does not appear to be any reason to suppose any greater difficulty in proving knowledge of the obscene contents of material. A study of the results in federal and state obscenity prosecutions has led to the conclusion that "prosecutors have had absolutely no difficulty in proving the requisite scienter", even where such requisite included proof of the obscene nature of the materials involved. Note, "The Scienter Requirement in Criminal Obscenity Prosecutions", in 41 New York University L.Rev. 790-791 (1966).

It is submitted that the interests in the protection of freedom of speech and press and the right of the public to be informed on all matters of human interest far outweigh the arguments of "judicial notice", "irrebuttable presumptions", and "prosecutorial convenience" which are advanced against the enunciation of constitutionally requisite standards for judging obscenity. If First Amendment and due process guarantees are to depend on jury verdicts, then, it is submitted, the jury should have before it substantial evidence establishing that the accused knew the contents of the material, was aware of the obscene nature and character of the material and, with such guilty knowledge, disseminated the material with the specific intent to appeal to a prurient interest. An accused in an obscenity prosecution, like any other criminal prosecution, is entitled to the presumption of innocence and entitled to have the prosecution prove, beyond a reasonable doubt, every essential element of the offense. If the *scienter* requirement of the federal obscenity statute is defined merely as "knowledge of contents", then the statute, so construed and applied, unreasonably threatens material entitled to constitutional protection. The introduction of strict criminal liability into obscenity prosecutions will bring the excessive and unnecessary self-censorship so detrimental to the public's access to constitutionally protected material.

II.

The Record Is Barren of Any Evidence to Establish That Petitioners, or Any of Them, Knew the Contents of the Brochure. There Is No Evidence in the Record to Establish That Petitioners Corruptly Conspired to Violate the Federal Obscenity Statute by Mailing or Causing to Be Mailed the Alleged Obscene Brochure. There Is No Evidence in the Record to Establish That Petitioners Knowingly Mailed or Caused to Be Mailed or Aided and Abetted the Mailing of the Said Brochure. 18 U.S.C. §§2, 371 and 1461, as Construed and Applied to Authorize the Judgments of Conviction Herein Violate the Free Speech and Press, Due Process, Fair Trial and Cruel and Unusual Punishment Provisions of the First, Fifth, Sixth and Eighth Amendments.

A. There has never been any claim by the Government that it proved the individual petitioners, or the corporate petitioners, knew that the brochure or advertisement was obscene as alleged in the Indictment. There has never been a claim that petitioners intentionally mailed the brochure with such knowledge, or that the mailing of the brochure was accompanied by any intent of the petitioners to appeal to a prurient interest.

Petitioners have previously discussed what petitioners submit are the requisite constitutional standards for judging scienter in federal obscenity prosecutions. Nevertheless, even on the Government's own theory that all that was required was proof of "knowledge of the contents" of the brochure, the petitioners submit that there is no relevant evidence in the record to show that any of the petitioners knew the contents of the brochure or advertisement or knew the so-called

nature and character of the contents at the times when the brochure was mailed as alleged in the Indictment.

The only evidence offered by the Government was the insertion of the brochures by the Academy Addressing and Mailing Service in North Hollywood, California, some 200 miles from the location of the business enterprise in San Diego. The brochures were brought to the mailing service by employees of an organization known as Regent House, also located in North Hollywood. The witnesses who testified for the Government from Academy Addressing and Mailing Service both testified that they knew nothing about the corporate petitioners herein nor had they had any dealings with nor did they know any of the individual petitioners. The billings were to Regent House from Academy Addressing and Mailing. There is not the slightest evidence in the record that these petitioners, or any of them, were in any way responsible for the preparation of the contents of the advertisement or its mailing. The Government never called any representative of Regent House or any representative of the printer of the brochure, also located in North Hollywood. The only evidence was a check from Reed Enterprises to Regent House and another to London Press, Inc., the printer, bearing the signature of petitioner Hamling.

The evidence is completely lacking that any of the individual petitioners personally prepared or mailed the brochure. There is no evidence, direct or circumstantial, probative of the crucial element of the offense as charged by the Government, to wit, that each of these petitioners knew the contents of the particular brochure alleged in the Indictment.

All that the Government did in this case was to introduce the articles of incorporation of the various

corporate petitioners, certificates of amendments to the articles of incorporation, minutes of meetings of the board of directors, applications for post office boxes, bank signature cards, shipping memorandums and invoices, postage meter license permits, and other related documentary testimony dealing with normal intra-corporate activities. This evidence, however, showed no more than that petitioners were engaged in a lawful enterprise; that petitioners were engaged in an open and innocent business. None of this evidence was probative of the vital element of scienter, to wit, each of the petitioners' state of mind, each of the petitioners' "knowledge of the contents" of the specific brochure, this on the Government's theory of the case. See, *Vachon v. New Hampshire*, ... U.S. .... (Oct. Term, 1973, No. 73-573 decided January 14, 1974). See also, *Keegan v. United States*, 325 U.S.478; *Baumgartner v. United States*, 322 U.S.665, 677; *Tot v. United States*, 319 U.S.463, 473; *Fiske v. Kansas*, 274 U.S. 380, 386; *Bailey v. Alabama*, 219 U.S.219; *United States v. Roberts*, 465 F.2d 1373 (6 Cir. 1972); *United States v. Lynn*, 461 F.2d 759 (10 Cir. 1972).

With respect to the petitioner David L. Thomas, there is no evidence in the record, it is submitted, which would justify the slightest finding in reason that this petitioner had any connection with the preparation or mailing of the advertisement or that he in any way knew the "contents" or the "nature and character" of the advertisement. Petitioner Thomas was listed in some of the corporate documents offered by the Government as a vice-president of the various corporations when he signed bank signature cards or license applications, and the like. There was no other evidence against this petitioner, oral or documentary. There was

not the slightest evidence in the record that petitioner Thomas had anything to do with the advertisement.

The evidence in connection with the advertisement, insofar as petitioner Shirley Wright is concerned, is in similar fashion entirely negative. The government documents, which covered a period back to 1965 and prior thereto, appeared to indicate that Shirley Wright was in the employ of some of the corporations at such times; that she was listed as an officer and a member of the Board of Directors of several of the corporations; that she signed waivers of notices of meetings and signed as an officer of the corporation. In most instances she was designated secretary or secretary-treasurer, and it is apparent that she did the work of a secretary and office manager in the business of Reed Enterprises, Inc. There is no evidence to indicate that she received a salary as an officer or remuneration for attending meetings of the Board, and a reasonable inference is that much of the official designation was for the convenience of her employer. There is nothing in the documentary evidence to indicate in any way that petitioner Wright was at all involved in any way in anything else than office management. Insofar as the advertisement is concerned, there is again not the slightest evidence to indicate that she knew anything about the mailing of the brochure, the preparation of the advertisement, or that she in any way knew anything about the "contents" or the alleged "nature and character" of the contents of the said advertisement.

Insofar as the petitioner Earl Kemp's relationship with the advertising brochure here involved is concerned, the evidence is similarly barren. The only evidence to which the court below could point was that petitioner Kemp had one time signed a postal

service document for a rental of a post office box, No. 20308, on behalf of petitioner Library Service, Inc. The fact is, as the record clearly reveals, petitioner Kemp's only activity as shown in the record was that he served as editor of the Illustrated Report, upon the alleged obscenity of which the jury could not agree. The record clearly reveals that the post office box had already been in the name of Library Service, Inc. sometime prior to the date when petitioner Kemp affixed his signature; that as a result of the urging of a postal inspector who conducted the investigation which led to the prosecution herein, a post office employee was sent to San Diego to insist that new signatures appear on the applications for the post office box; that petitioner Kemp was called out of his editorial office to sign an application at the instance of the postal employee; that petitioner Kemp did not know whether or not he held an officership in Library Service, Inc.; that he was informed that he was occupying the nominal position of vice-president and then signed as a mere formality [JA 137-146]. There was simply no evidence concerning petitioner Kemp which in any way indicated that he had anything to do with the preparation of the advertising brochure which emanated from a Regent House in North Hollywood, and there is no evidence to indicate that he had anything to do with the mailing or had any knowledge of the "contents" or "nature and character" of the contents of the material. In support of a motion for judgment of acquittal or, in the alternative, for a new trial and arrest of judgment [C.T. 1136-1139], the petitioner Kemp submitted a sworn affidavit indicating that he knew nothing concerning the preparation or contents of the advertisement and that, as a matter of fact, at

the time the brochure was allegedly prepared and mailed in North Hollywood petitioner Kemp was in Europe on a business trip.

With respect to petitioner Hamling, the only evidence in the record is a check from Reed Enterprises, Inc. to London Press, Inc. in the sum of $4,843.14, and another check from Reed Enterprises, Inc. to Regent House in the sum of $3,817.80, each signed by petitioner Hamling. There is no other evidence in the record that in any way, by act, declaration or statement, connects petitioner Hamling with the mailing of the brochure or with any knowledge of its contents or its nature and character.

With respect to the corporate petitioners, the sole evidence relating to Reed Enterprises, Inc. is the issuance of the two aforesaid checks, and the sole evidence relating to the corporate petitioner Library Service, Inc. is the appearance of its name on the brochure.

The petitioners were not charged with unlawfully renting a post office box, nor did the jury agree that mailing the Illustrated Report to the postal patrons responding to the advertisement was a violation of the federal obscenity law. There was no claim of illegality, nor could there be, in the fact that petitioners were officers of corporations or directors of corporations or that they acted in concert in the business of publishing and distributing books (Application A to Pet. for Writ of Cert., pp. 5-6, 24-25). Looking at the evidence in the light most favorable to the Government, the sole proof showed that the preparation, printing and mailing of the brochure herein involved took place in North Hollywood, California under the auspices of corpora-

tions and individuals unrelated to petitioners. The only witnesses offered by the Government testified that they knew none of the petitioners nor had even heard of petitioners.

That an accused is an officer in a corporation or a member of a board of directors or, as an officer of a corporation signs a check in payment of a bill, or is a secretary, or is an editor of a book, is not sufficient in itself, it is submitted, to prove that such accused knew the contents of a particular advertisement or brochure. The trial court itself instructed the jury as follows: "An officer of a corporation cannot be held criminally responsible for an act unless he personally or actually did the act or the acts were done by others at his direction or with his permission." [R.T. 4936]. If this be deemed the law of the case as given to the jury, there is simply no evidence in the record in the light of such standard to justify a finding that each of these petitioners knew the contents of the particular brochure here involved.

It is the general rule that it is essential to the criminal liability of the officer of a corporation that such officer actually and personally do the acts which constitute the offense, or that such acts be done by his personal direction or permission. 19 Am.Jur.2d, Corporations, §1391, page 786. In *United States v. Interstate Engineering Corp.*, 288 F.Supp.402, 412 (D.C. N.H. 1967), where the charge was using the mails to defraud, District Judge Wyzanski instructed the jury, among other things, as follows: "I want as a special word of caution to point out to you that this criminal case against the individual defendants does not involve with respect to the individual defendants as distin-

guished from the corporate defendants any theory of imputed knowledge or anything of that sort. That is to say, when you are considering whether an individual X knows about something, you are to consider whether he personally knows about it, not whether some salesman acting for him knows about it, not whether some associate knows about it. In this kind of criminal case, whatever may be rules of agency in civil matters, individuals are to be judged on the basis of their personalized individual knowledge." See also, *United States v. San Francisco Electrical Contractors Ass'n*, 57 F. Supp.57, 69 (D.C. Cal. 1944); *United States v. Buckley*, 49 F.Supp.993, 995-996 (D.C. D.C. 1943); *United States v. Food and Grocery Bureau of Southern California*, 43 F.Supp.966, 971, 973 (D.C. Cal. 1942).

The Court recently stated in *In re Winship*, 397 U.S. 358, 361-364, 367:

* * *

"Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.

* * *

"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'

* * *

"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

* * *

See also, *Cool v. United States*, 409 U.S.100; *Speiser v. Randall*, 357 U.S.513, 526.

Moreover, it is important to note that under the Indictment the Government was required to establish beyond a reasonable doubt that each of these petitioners "did knowingly use, and cause to be used," the mails for the mailing of the brochure "from North Hollywood, California" to the specified recipients. In the light of the record made by the Government, it appears plain that there can be no claim that any of the petitioners here personally mailed the advertisement to the particular recipients from North Hollywood on the specific dates alleged in the Indictment. There is no proof in the record to establish that any of these petitioners "aided and abetted" such action. One does not aid and abet a particular mailing unless there is substantial evidence to establish beyond a reasonable doubt that the particular accused knowingly participated in such mailing. The Government was required to prove beyond a reasonable doubt that the person who is being aided and abetted is intentionally committing a crime; that the aider and abettor knows that the other is committing a crime; that the aider or abettor has the purpose to aid the other to commit the crime; and that the aider in fact rendered aid or assistance. These are

the elements which have to be established before an accused can be convicted of aiding and abetting another to commit a crime. There was simply no such evidence in the case herein with respect to each of the petitioners. See, *United States v. Townsend*, 474 F.2d 209 (5 Cir. 1973); *United States v. Williams*, 470 F.2d 1339 (8 Cir. 1973); *United States v. Hill*, 464 F.2d 1287 (8 Cir. 1972); *United States v. Docherty*, 468 F.2d 989 (2 Cir. 1972); *United States v. Garguilo*, 310 F.2d 249, 252-255 (2 Cir. 1962); *Grimes v. United States*, 379 F.2d 791 (5 Cir. 1967).

In similar fashion, there is no proof in the record in this criminal prosecution that these particular petitioners "caused" the mailings by Regent House from North Hollywood. In the context of a criminal statute, the word "causes" has a different meaning than that imparted to it in other areas of the law. The mere causal connection that might be sufficient to constitute proximate causation is not enough to impose criminal responsibility. Hall, *General Principles of Criminal Law*, 2d Ed. 1960, pages 254-257. The reason is that a criminal purpose or intent must accompany the causal nexus before conviction for a crime can be had. See, *United States v. Peoni*, 100 F.2d 401 (2 Cir. 1938).

In *Nicolopoulos v. United States*, 332 F.2d 247 (1 Cir. 1964), the defendant was convicted of conspiracy and the substantive offense of "causing the transportation of stolen firearms in interstate commerce knowing the same to have been stolen." The evidence showed clearly that the defendant purchased stolen firearms and knew that they were stolen. There was evidence also to indicate that subsequent to the time when defendant agreed to buy the stolen firearms, he was told that the guns had been stolen in another State. The

appellate court nevertheless held that there was no basis for a finding that the defendant had reason to know that the guns which he had purchased had been or were to be transported at the time the agreement was made. "Yet under this statute, whatever else may be required, it must be that 'causing' interstate transportation requires knowledge on the part of the defendant, or, at least, reasonable grounds to know, that his conduct involves, or will result in, such commerce . . . The testimony of a witness that subsequent to the event defendant told him the guns had been stolen in Troy, New Hampshire . . . is not evidence that defendant knew this fact at the time he agreed to buy them and thereby, allegedly 'caused' their transportation in interstate commerce." 332 F.2d at 248-249. See also, *Rosenberg v. United States*, 120 F.2d 935, 937 (10 Cir. 1941); *Brady v. United States*, 24 F.2d 399, 403 (8 Cir. 1928).

B. The record is barren of any proof supporting the charges made in Count 1 of the Indictment [JA 14-16], to wit, that petitioners "willfully and knowingly" conspired to violate the federal obscenity statute with the object of using the mails for delivery of an obscene advertisement. There was no proof that these petitioners, or any of them, entered into any corrupt agreement with any specific intent to violate the federal obscenity law, 18 U.S.C. §1461. When the government attempts to use the conspiracy weapon against publishers, distributors, corporations, officers, directors, employees, and other persons engaged in the normal activity of publication and distribution of media of communication ordinarily protected by the First Amendment, then such restraint "must be subjected to close analysis and critical judgment". *Speiser v. Randall*,

357 U.S. at 520. Especially is this true in the case herein, where the government's own documentary evidence showed open and normal business activities. The usual presumption is that such persons engaged in normal business activities take ordinary care of their own affairs, obey the law, and are innocent of any crime. ". . . criminality cannot be proved by proving innocence." *Langer v. United States*, 76 F.2d 817, 827 (8 Cir. 1935). See also, *Keegan v. United States*, 325 U.S.478.

It was the government's theory in the trial below that the only burden upon the government was to show that petitioners knowingly agreed "to mail out certain material", and that if the jury found the material to be obscene at the trial, then a "conspiracy to mail obscene material" had been established [R.T. 3065-3066]. Such a contention, of course, renders the federal obscenity statute, 18 U.S.C. §1461, vague, ambiguous, uncertain and overbroad, as construed and applied. See, *Speiser v. Randall*, 357 U.S.513; *Smith v. California*, 361 U.S.147.

The burden was upon the government to initially prove a corrupt agreement on the part of each of these petitioners. There was no such proof. The burden was also upon the government to prove that each of the petitioners entered into the corrupt agreement with a specific intent to violate the federal obscenity statute, or, as the precedents indicate, entered into the common purpose with knowledge that a violation of law would result from the commission of the contemplated act. The gist of the crime of conspiracy consists of a corrupt agreement between two or more individuals to do an unlawful act (18 U.S.C. §371). The fact that persons are associated together is never in itself proof

of a criminal conspiracy. Such association is often innocent. The criminal quality resides in the intention of the parties to the agreement. There must be proof of a specific intent to violate the law. Plainly, as the discussion hereinabove indicates, there is not the slightest evidence in the record by any act or declaration of any petitioner to indicate that the petitioners entered into an unlawful agreement with guilty knowledge and specific intent to violate the federal obscenity statute. There can be no such claim in the case herein.

The cases are uniform in holding that the essence of the offense of conspiracy lies in the intent; an intent to commit a specific unlawful act. The cases indicate that the existence of such a specific intent must be proved as a fact and is not presumed from the commission of an act. Thus, if the charge be conspiracy to use the mails for the delivery of an alleged obscene advertisement, there must be proof that each of the accused entered into such a corrupt agreement, knowing that such advertisement and mailing would violate the federal obscenity statute. Without proof of such specific guilty knowledge, no intent to violate the law is established. Moreover, the evidence of guilty knowledge must be clear, not equivocal, and this because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what is in effect a dragnet to draw in all substantive crimes. *Krulewitch v. United States*, 336 U.S.440, 445, 446, fn. 2; *Grunewald v. United States*, 353 U.S.391, 404; *United States v. Falcone*, 311 U.S.205; *United States v. Steele*, 469 F.2d 165 (10 Cir. 1972); *United States v. Jensen*, 462 F.2d 736 (8 Cir. 1972), opinion by Assoc. Justice Tom C. Clark; *Dennert v. United States*, 147 F.2d 286 (6 Cir. 1945); *Dahley v. United States*, 50 F.2d 37, 43, 46 (8 Cir. 1931).

III.

The Wholesale Exclusion of Constitutionally Relevant Evidence Proffered by Petitioners Deprived the Petitioners of a Fair Hearing and Fair Trial, an Opportunity to Be Heard and to Defend Against the Charges, With Resultant Deprivation of Petitioners' Liberty, Contrary to the Free Speech and Press, Due Process and Fair Trial Provisions of the First, Fifth and Sixth Amendments.

A. Prior to the trial, the petitioners requested the court to take judicial notice of comparable illustrated material held to be constitutionally protected expression by the Supreme Court of the United States, various courts of appeal, and federal district courts throughout the United States [C.T. 864-889]. The trial court stated: "I do not intend to make comparison because I do not think that is appropriate." [R.T. Vol. E 56]. On motion for discovery and inspection, the court itself raised the question of the "business of producing comparables" [R.T. 171] and stated that, "I think your proper procedure is through the testimony of experts, and I am going to—and I may as well tell you in advance—draw a very tight rein on the admissibility of evidence with regard to whether or not this is or is not obscene" [R.T. 172].

During the trial, while counsel for petitioners was cross-examining a government witness, a Mr. Urban, the owner of a newsstand in Dallas, Texas, the question was put to the witness as to whether he was familiar with the book *Sex and Marriage* [R.T. 644]. Upon objection by the prosecutor, the trial court stated to petitioners' counsel, "I am going to tell you right now, we are trying one thing, one thing only: this book. We are not trying all other books. We are not in-

troducing any comparables at this point in the trial or anything else" [R.T. 646]. An offer to prove through the witness that he had in his store hundreds of books containing pictures as explicit and candid in dealing with sex as those which were contained in the particular publication involved in the proceeds was rejected [R.T. 648-650]. The court stated that "proof of comparables" would have to be "on a national standard and they are going to have to be through experts, not through individuals" [R.T. 651].

In subsequent discussion on the issue of comparables, counsel for the petitioners pointed out that there were several categories of documentary evidence which the petitioners proposed to introduce. The first involved second-class mailing privileges; the second involved material that had been adjudicated by the courts to be constitutionally protected; and the third involved material openly available on the newsstands [R.T. 1963]. The court stated that it had not yet made up its mind with respect to the issue of comparables, but that "if, in fact, I do allow comparables in, it is going to be restricted to no more than three, if I allow it in at all, and then I am going to have to make the determination of which comparables or what types of comparables I am going to allow in" [R.T. 1964].

The prosecution called Frank Getline, an art critic for the *Washington Evening Star* [R.T. 2222], and offered the witness as an alleged expert on contemporary community standards dealing with matters of sex and nudity in "the visual communicative media" [R.T. 2233]. During the cross-examination of the witness, who had testified that he was familiar, generally, with material that is available in adult bookstores through-

out the country, counsel for the petitioners indicated to the trial court that counsel desired to show the witness two books which had been purchased in San Diego stores and which were available in adult bookstores throughout the country. The books were entitled *Animal Lovers* and *The Advanced Handbook of Swappers*, which counsel indicated depicted explicit sexual relations, including relations with animals [R.T. 2851]. Petitioners' counsel indicated that petitioners were prepared to show that books of this nature were available in cities throughout the country [R.T. 2852]. The trial court stated that the books were admissible "for the limited purpose of impeachment", but "I am not going to say that I will let it be put into evidence nor am I going to let it be shown to the jury" [R.T. 2854].

During the trial, the trial court definitively stated that the court would not take judicial notice of the adjudicated decisions, as counsel had requested [JA 157-158]. The court stated:

> "Finally, with respect to the matter of comparables, which we have talked about in recent times—it is the Court's opinion that the cases support the proposition that the Court is required to allow defense counsel to proceed in order to show the community standards involved, *either by comparables, by the introduction of comparables or by the introduction of expert witnesses with respect* to the elements to be shown. The Court finds and rules that *comparables will not be permitted for this reason:* primarily, they tend to confuse the jury. They tend to set up matters that I feel would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom. * * *"

Formal objections to the ruling of the court were thereupon made by counsel for the petitioners [R.T. 3154-3161]. The contention of the petitioners was that the either/or ruling of the court denied the pertioners due process of law and denied petitioners their rights to protection under the First Amendment.

The petitioners called, on their behalf, witness W. Cody Wilson, who served as Executive Director for the Commission on Obscenity and Pornography [R.T. 3186-3208]. During the direct examination of the witness, petitioners' counsel asked the witness to verify that certain pictures containing sexual depictions had been used by various researchers retained by the Commission [R.T. 3380-3382]. The court stated: "Well, as far as the Court is concerned, these pictures are not going to be admitted, nor are they going to be marked." [R.T. 3382]. The witness Wilson was asked whether he had found any explicit sexual material, as defined by the Commission, available in the San Diego area [R.T. 3575-3576]. The witness replied that all such material was available [R.T. 3576]. The witness also testified that essentially the same kinds of material were found throughout the United States [R.T. 3577]. The witness was then shown the magazine "Animal Lovers" and a magazine "The Advanced Handbook of Swingers" [Deft. Exs. QQ, RR] and was asked whether the magazines had a reasonable degree of acceptance in the Nation as a whole. He stated that they had such acceptance, based on scientific studies, on his own personal conversations with people and his own knowledge. The witness was also shown three other exhibits [Deft. Exs. BC, BD, BE] and stated that they, too, on the basis of scientific studies and his own personal knowledge, have a reasonable degree of acceptance in

the Nation as a whole [R.T. 3578]. The exhibits were offered into evidence, and the trial court stated: "I see no need for it to come into evidence, Mr. Katz. They may be marked for identification, but there is no need for them to come into evidence." [R.T. 3579].

The petitioners offered the witness Virginia Carlson [R.T. 3922], a student of San Diego State University. Her special major included journalism, psychology and speech communication [R.T. 3923]. Under the supervision of Dr. Haberstroh, Assistant Professor of Advertising in the Journalism Department at San Diego State, who had previously testified [R.T. 3941], the witness conducted a survey of residents of San Diego to determine their reactions to *The Illustrated Report* and the advertising brochure [R.T. 3926]. The witness described the investigation she conducted in detail and the prepared questionnaire that was used, all of which petitioners offered to prove demonstrated that a majority of the residents were in favor of people reading the book, that they thought the book should be read, and that a substantial majority said the advertisement should also be available to the public in general [R.T. 3932]. The court stated that because a national standard was involved, the standards of San Diego were not relevant and the evidence was inadmissible [R.T. 3933], although the counsel for petitioners stated that additional experts were going to be brought in to talk about standards throughout the country and that material with respect to one area of the country was clearly relevant in finally determining the question of national community standards [R.T. 3941]. It was urged upon the court that the testimony supported a national survey that had actually been made by the Commission and that the testimony bore upon the question of lack

of prurient interest appeal [R.T. 3934-3947]. The trial court declined to permit the testimony of the witness or to admit either the questionnaire or the results of the study [Deft. Exs. BH, BI; R.T. 3937-3938].

Finally, after the petitioners rested, the court stated that it was now prepared to listen to argument "on the introduction of evidentiary matters, physical evidentiary matters" [JA 209]. Petitioners offered Exhibit A, the film which had been held to be constitutionally protected in *Pinkus v. Pitchess*, 429 F.2d 416 (9 Cir. 1970), aff'd 400 U.S.922. The petitioners offered two magazines entitled, respectively, "Togetherness" and "Flesh and Fantasy", which had been found to be not obscene by the United States Supreme Court [Deft. Exs. A-1, A-2; JA 210-211]. See, *Burgin v. South Carolina*, 404 U.S.806, rvsg. 178 S.E.2d 325. The court stated, "They may be marked. I am not going to permit them into evidence, Mr. Fleishman, but they may be marked. Nor am I going to permit the film into evidence."

The petitioners offered the magazine entitled "Nude Living No. 63" [Deft. Ex. II: JA 212-213], a magazine which had second-class mailing privileges and, it was urged, was comparable material which the jury should see. The court denied admission of the evidence [JA 213].

Petitioners offered Exhibits QQ and RR, the magazines entitled "Animal Lovers" and "The Advanced Handbook of Swingers" [JA 213-214], upon which there had been testimony from the prosecution witness Getline that similar material was found in adult bookstores in his informal survey and the witness W. Cody Wilson had stated that illustrations contained in the

magazine were contained in material in adult bookstores throughout the country. The material was offered on the question of customary standards in the light of acceptance by the community [JA 213-215]. The motion to admit the evidence was denied [JA 215].

The petitioners offered publications entitled "Deviant Sexual Behavior", "The Advanced Handbook of Oral Sex" and "Screw, The World's Greatest Newspaper" [Deft. Ex. BC; JA 215]. Admission of the evidence was denied [JA 215].

Petitioners offered into evidence three publications entitled "Couples", "Whipsters" and "Questions and Answers" [Deft. Exs. P, O, R; R.T. 4374].

The petitioners offered Exhibits JJ-1 through JJ-11, which were sex educational pamphlets, the covers of four of the said pamphlets having appeared in The Illustrated Report [R.T. 4374]. The motion to introduce the material was denied [R.T. 4376].

Petitioners offered Exhibits HH and GG, which were certain issues of "Playboy", the cover of one being identical to a picture in *The Illustrated Report*, and about which both prosecution and defense witnesses had testified on the issue of the value of using more than one picture to illustrate a point. The motion to admit the evidence was denied [R.T. 4377].

Petitioners again tendered Exhibits BG, BH and BI, which were the chart, the questionnaire and the results of the study conducted by defense witness Virginia Carlson [R.T. 4377]. The offer was rejected [RT. 4377].

Petitioners offered various still photographs, some fifteen different books, and a deck of playing cards,

as material which a Dr. James Howard had used in his study for the Commission [R.T. 4386, 4392-4393; Deft. Ex. BJ], all of which was rejected [R.T. 4393].

B. The trial court excluded an entire category of evidence offered by petitioners which bore importantly on the issues of obscenity and *scienter*. The Court stated that under no circumstances would it permit the jury to consider, nor would the Court itself consider, any comparison of the contents of the material involved in the prosecution with that of other comparable material openly published, widely distributed and generally accepted by the community. Thus, the jury was permitted to conclude that the material involved exceeded the limits of candor set by contemporary community standards without ever being permitted to receive evidence as to the kinds of explicit sexual material the community generally tolerates.

The Court of Appeals upheld the rulings of the trial court on the ground that the trial court, in the exercise of its discretion, had rejected the evidence because "they tend to confuse the jury"; because the mere fact that comparable material was sold and purchased in "book stores around the country does not make them witnesses of virtue"; and because the comparable materials offered by petitioners were not "relevant" and "had no logical or reasonable social value attributed to them" for the jury to consider in determining the obscenity or nonobscenity of the brochure.

These considerations overlook the fact that the trial court excluded all comparable material as an entire category. The trial court merely concluded that it would permit the introduction of evidence by petitioners in only one category, to wit, the testimony of experts, but

the jury was refused permission to examine the very books, magazines, pictures, etc., commonly accepted in the San Diego and national communities upon which the experts were commenting. The issue here, therefore, is not whether the comparable material would have been "confusing". The trial court could have always, of course, limited the amount of material submitted. The important issue is that all of the comparable testimony was excluded, without exception. It was for the jury to determine the weight to be given to such evidence; it was for the jury to determine whether the material was sufficiently comparable in all respects to the brochure under consideration. The trial court had before it reasonable alternatives with respect to the admission of the quantity of evidence offered by petitioners. There was no possible justification for wholly denying petitioners all opportunity to present an entire category of testimony in their defense, even to the extent of excluding comparable material held entitled to constitutional protection by this Court. The petitioners here were deprived of essential exculpatory testimony for no legitimate reason, it is submitted.

In *Smith v. California*, 361 U.S.147, Justice Harlan concurred with Justice Frankfurter that the trier of an obscenity case must take into account "contemporary community standards". Thus, a conviction in an obscenity prosecution could not be permitted if the work complained of did not substantially exceed the limits of candor set by contemporary community standards.

> "The community cannot where liberty of speech and press are at issue condemn that which it generally tolerates. This being so, it follows that due process . . . requires a State to allow a litigant

in some manner to introduce proof on this score." 361 U.S. at 171-172.

"However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. There are other ways in which proof can be made, as this very case demonstrates. Appellant attempted to compare the contents of the work with that of other allegedly similar publications which were openly published, sold and purchased, and which received wide general acceptance." 361 U.S. at 172.

The danger of excluding evidence offered by an accused pertinent to the essential issues involved in the determination of "obscenity" is that: "The possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterances will be punished." *Speiser v. Randall*, 357 U.S.513, 526. This Court has specifically held:

"The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. . . . And, as we have noted above, this right becomes particularly fundamental when the proceeding allegedly results in finding that a particular individual was guilty of a crime." *Jenkins v. McKeithen*, 395 U.S.411, 429.

Deprivation of the right to present evidence bearing upon the issues in a case has been specifically adjudged by the court to be a denial of due process. *Saunders v. Shaw*, 244 U.S.317, 319; *Chin Yow v. United States*, 208 U.S.8, 11-13.

The trial court recognized that there were plainly two categories of evidence which the petitioners could introduce on the issue of obscenity and the corollary issue of *scienter*. It was open to the petitioners to produce expert testimony on issues of contemporary standards and other elements embodied in the concept of obscenity, and it was also open to the petitioners to present evidence of what was going on in the community, what was accepted in the community with respect to the depiction and representation of sex and nudity in the United States. The trial court arbitrarily concluded that it would permit the introduction of evidence by petitioners in only one category, to wit, the category of experts. Clearly, this was fundamental error. It is always open to defendants in a criminal prosecution to introduce into evidence in their behalf all categories of proof which bear on the issues, and an arbitrary exclusion of one kind of evidence is plainly a denial of due process of law, as the decision of this Court and other courts, both state and federal, make evident. See, *Wolcher v. United States*, 200 F.2d 493, 499 (9 Cir. 1952); *Crawford v. United States*, 212 U.S.183. "There is a presumption of harm arising from the existence of an error committed by a trial court against a party complaining, in excluding material evidence on a trial, especially before a jury." 29 S.Ct. at 267.

It is also anomalous that the trial court permitted the experts, at times, to comment upon the comparable material offered by petitioners, but, at the same time, refused to permit the jury to examine the very books, magazines, pictures, etc., commonly accepted in the community upon which the experts were comment-

ing. Thus, even with respect to the experts' testimony, the jury was deprived of the opportunity for learning the bases for the expertise claimed by the experts and the bases for their opinions that the material was not obscene. See, *United States v. Minor*, 459 F.2d 103 (5 Cir. 1972). It should also be recalled that petitioners' experts specifically testified that the comparable materials with respect to which they were testifying, and which the jury were not allowed to see, were openly sold and purchased, and had a reasonable degree of acceptance in the Nation as a whole [JA 166; R.T. 3922-3947].

The exclusion of the comparison evidence, and the consequent undermining of the expert testimony offered by the petitioners was, it is submitted, a palpable denial of a fair hearing and a deprivation of liberty without due process of law. The jury, the sole trier of the facts on the crucial standards of contemporary community standards, as well as the issues of prurient interest, social importance and *scienter*, was denied the right to consider essential evidence on constitutionally relevant issues. The trial court licensed the jury to create their own subjective standards for freedom of expression and to disregard the community toleration which in fact exists in the Nation toward the depiction and representation of sex and nudity.

In a criminal prosecution, the government must prove its case beyond a reasonable doubt, and it is plain that neither court nor prosecution can "prevent the defendant from producing evidence which might create the reasonable doubt". *United States v. Zborowski*, 271 F.2d 661, 668 (2 Cir. 1959). The burden was on the government here to prove beyond a reasonable

doubt that the advertisement substantially exceeded customary limits of candor throughout the Nation in the depiction and representation of sex and nudity, appealed to a prurient interest, and was utterly without social importance. These were the elements which the government had to establish, by evidence, beyond a reasonable doubt, and which the petitioners sought to disprove.

All evidence that is rationally probative is admissible, unless excluded by some rule or principle of law. The trial of a criminal action lies in the evidence, and to refuse admission of competent evidence is to refuse to hear the cause. Moreover, the relevancy or probative value of evidence with respect to any issue is to be sharply distinguished from the weight of the proof. If the evidence is worthy of consideration by the jury, "it is for the jury to give it the appropriate weight in effecting persuasion". 1 Wigmore, Evidence §29 (3d Ed. 1940). As was stated in *Miller v. United States*, 120 F.2d 968, 973 (10 Cir. 1941):

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen."

Conclusion.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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